On April 19, 1995, petitioners and respondent Trustee entered into two Buy-Sell agreements for the Notes, and the Treasurer executed a "Joinder" to each agreement. The agreements and Joinders were attached to petitioners' complaint and authenticated by respondents' answer.

After execution of the two Buy-Sell Agreements and Joinders, print and electronic media reported the agreements to the public, and, by May 1995, then-Attorney General Jim Ryan publicly announced that he would conduct a review of the Buy-Sell agreements and that the proposed closing would not occur until his review was completed. The uncontroverted record evidence before the trial court contained affidavit testimony to the effect that representatives of the Treasurer and of the Trustee advised counsel for petitioners that neither would proceed to closing under the Buy-Sell agreements without the consent of the Illinois Attorney General.

Rulings Below

The trial court afforded the parties an opportunity to discover the facts surrounding the dispute and determined, as a matter of Illinois summary judgment practice, that there had been a valid contract among the Treasurer and the Trustee, on the one hand, and petitioners, on the other hand, and that the Treasurer and Trustee breached that contract by failing or refusing to perform their obligations when due, notwithstanding the fact that petitioners were ready, willing and able to perform their obligations. That trial court further found, as a matter of settled Illinois equity jurisprudence, that petitioners lacked an adequate remedy at law and were entitled to the equitable remedy of a decree of specific performance, compelling the Treasurer and the Trustee to convey the Notes forming the subject matter of the contract to petitioners on the terms specified in the contract.

The Illinois Appellate Court affirmed the entry of summary judgment and the decree of specific performance. In a previous appeal during the proceedings, the appellate court had found that the state-law doctrine of sovereign immunity did not apply to deprive the courts of subject matter jurisdiction, and, in affirming the final order of the trial court, the appellate court followed and applied its law of the case to the question of sovereign immunity.

The Treasurer and the Trustee petitioned the Illinois Supreme Court to review the case. By divided opinion, that court reversed the Illinois Appellate Court and the trial court, holding that sovereign immunity applied to insulate the Treasurer and the Trustee's breach of contract from review. In their Petition for Rehearing to the Illinois Supreme Court, petitioners asserted that the denial of subject matter jurisdiction on the grounds of sovereign immunity, coupled with settled principles of Illinois law under which the Illinois Court of Claims lacked jurisdiction to provide equitable relief in claims against the State or its officials, operated to deprive petitioners of their rights to due process as guaranteed by the Constitution of the United States.

On September 26, 2005, petitioners' request for rehearing was denied, without explanation.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court's Decision Operates to Deny Petitioners Due Process of Law, Through the Elevation of the State's Doctrine of Sovereign Immunity as a Barrier to any Effective Remedy for Petitioners, Notwithstanding Respondents' Clear and Unwarranted Refusal to Perform Obligations Arising Under Commercial Contracts

On June 3, 2005, the Illinois Supreme Court, by divided Opinion, reversed the Illinois Appellate Court's judgment affirming the decree of specific performance entered by the Illinois Circuit Court to enforce petitioners' contract to acquire two Notes in the State's portfolio of investment assets. (A copy of the court's Opinion is set forth at Pet. App. 1a-43a of the Appendix to this Petition.)

There is no question that a contract had been entered into, and there was no basis in fact to question petitioners' readiness, willingness and ability to perform under the contract. Similarly, there was no question that, under the contract that she joined, the Treasurer had agreed to sell two Notes for $10 million, that the price to be received for the two Notes was an amount in excess of any other offers made to acquire the Notes and that the Treasurer's decision to withdraw from the contract she signed was based upon pressure received from the former Illinois Attorney General, purporting to sit in judgment of the Treasurer's performance of her state constitutional duties. This case does not present a question of contractual interpretation or a dispute whether performance offered pursuant to contract was sufficient under the terms of the parties' agreement: the Treasurer simply refused to acknowledge or tender any performance under her binding contract.

Petitioners sued for mandamus and mandatory injunctive relief, seeking specific performance of the agreement. The trial court found, on petitioners' motion for summary judgment, that petitioners satisfied all of the requirements for entry of a decree of specific performance.

Notwithstanding a clear line of precedent in the Illinois Court of Claims denying the remedy of injunctive relief against the State, and notwithstanding the Illinois Supreme Court's precedent stretching back at least 68 years to permit suits against state officers when those officers' actions represent a departure from the law (and, therefore, action outside of their authority as agents of the State), the court narrowly construed the "officer suit" exception to sovereign immunity to achieve a result that was both fundamentally unfair to the petitioners and contrary to both the immediate fiscal interest of the State and its longer-term interests, as well.

The Illinois Supreme Court's decision denies petitioners any effective remedy to allow them to receive the benefits of the bargain they struck with the Trustee and the Treasurer. Regardless of the reasons why the Insured Mortgage Pilot Program was initiated, and regardless of the underlying causes of the strained relationship among the borrowers under the Notes and the Trustee, the fact remains that the Trustee and the Treasurer engaged in a fundamentally straightforward commercial transaction to liquidate assets in exchange for valuable consideration—two non-recourse Notes, secured by property interests that were losing value, were to be sold for $2 million more than anyone else had offered to acquire those assets. The Treasurer's decision to sell those assets fell within the constitutional responsibilities and prerogatives of her office, as set forth in Article 4, Section 18 of the Illinois

Constitution—as it happens, the decision was also a prudent business decision, in view of the quality of the assets and the premium above market value represented by the purchase price, but, irrespective of the wisdom of the Treasurer's business decision, there is no question that the decision was hers to make.

Thereafter, the Treasurer decided to withdraw from the transaction, on the basis, frankly, of the interference by the Attorney General in the Treasurer's performance of her duties. There was no difference of opinion between the Treasurer and the purchasers over the terms of the agreement or their interpretation, nor was there a disagreement among the contracting parties over the sufficiency of the Treasurer's purported compliance with the terms of the contract—instead, the Treasurer treated her agreement as a nullity.

Under the circumstances of this case, the Illinois Supreme Court's decision affords petitioners no meaningful remedy. The purchasers here have no recognized remedy in the Illinois Court of Claims to secure a decree of specific performance of the buy-sell agreement—that court has consistently held that it lacks jurisdiction to provide injunctive relief, and it has explicitly relied upon the Illinois General Assembly's failure to amend the statute and the Illinois Supreme Court's failure to hold otherwise as confirmation of an Illinois public policy that limits the jurisdiction of the Court of Claims. (*See, for example, Garimella v. Board of Trustees of the University of Illinois*, 50 Ill.Ct.Cl. 350, 1996 WL 1743235 (1996) [in absence of specific statutory provisions, court declines to provide injunctive relief or exercise broad equitable powers] (1996 WL 1743235, at *3); *Ace Coffee Bar, Inc. v. University of Illinois*, 51 Ill.Ct.Cl. 395, 1999 WL 33246477 (1999) ["Since

our decision in *Garimella*, the General Assembly has not seen fit to enact a statute granting us injunctive power and the Supreme Court has not addressed the issue. We adhere to *Garimella*. This Court lacks authority to issue the injunctive orders requested in this case."] (1999 WL 33246477, at *2); *Rudolph v. State of Illinois*, 53 Ill.Ct.Cl. 58, 2000 WL 34447702 (2000) [applying *Garimella*, coupled with absence of statutory amendments, to hold that Court of Claims lacked jurisdiction to entertain action seeking writ of *mandamus*] (2000 WL 34447702, at *3).)

Petitioners, as purchasers of the Notes, agreed to pay a premium above the market value of the Notes; as such, they lack the ability to sue for damages predicated on the difference between acquisition and market price of the assets they contracted to buy—ironically, the fact that these commercial assets had unique value to these purchasers (ordinarily the touchstone of the contract parties' right to seek specific performance) serves to deny them any effective relief, precisely when they most need that relief. This anomalous result calls for this Court's review, as petitioners have effectively been denied their property rights arising under their commercial contract without any recourse under the law—a denial of due process.

In any other context, the law would recognize petitioners' right to some measure of relief, but, because one of the parties to this contract is a person nominally acting in the capacity of a state officer, the doctrine of sovereign immunity came into play. In the Illinois Constitution of 1970, the People abrogated sovereign immunity as a constitutional doctrine, leaving it to the Illinois General Assembly, by statute, to define the State's immunity from suit.

Although the doctrine of sovereign immunity is rooted in English jurisprudence and was recognized by certain of the proponents of the United States Constitution as an element of law applicable in the new republic, the acceptance of that doctrine, at the time of the adoption of the United States Constitution, failed to appreciate the fundamental nature of the change envisioned by our republican form of government—instead of a society subject to the rule and prerogatives of a monarch or hereditary aristocracy, our nation was formed by and is governed by the people, as a whole, and the "sovereign" is the People, who formed the nation, adopted its Constitution and reserved to themselves all of the powers not specifically conferred on the offices of government.

Justice Souter's dissents in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), and in *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), carefully analyzed the historical underpinnings of the doctrine of sovereign immunity and demonstrated, through those analyses, the absence of a consistent or well-founded rationale for the doctrine in American jurisprudence. At a minimum, the analyses set forth in those dissents confirm the absence of a federal constitutional acceptance of the doctrine of sovereign immunity.

The Illinois Constitution makes it explicit that, as a matter of state law, sovereign immunity is not recognized as a constitutional principle. Article 13, Section 4 of the Illinois Constitution of 1970 provides, "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished." (Ill.Const., Art. 4, § 13). Although the Illinois constitution permits the Illinois General Assembly

to provide some level of immunity by law, any such law would, of necessity, be subject to both the State's and the United States Constitutions' requirement of due process. The doctrine of sovereign immunity under Illinois law is subordinate to those constitutional provisions.

The history of sovereign immunity jurisprudence in Illinois and elsewhere confirms the qualified nature of the assumed immunity. Well before enactment of the 1970 Illinois constitution, Illinois courts had recognized an exception to sovereign immunity for suits seeking equitable relief predicated on claims of a State official's departure from the requirements of law. (*See*, for example, *Schwing v. Miles*, 367 Ill. 436, 441-42, 11 N.E.2d 944, 947 (1937)

> The presumption obtains that the State, or a department thereof, will not, and does not, violate the constitution and laws of the State, but that such violation, if it occurs, is by a State officer or the head of a department of the State, and such officer or head may be restrained by a proper action instituted by a citizen.

City of Springfield v. Allphin, 74 Il.2d 117, 124, 384 N.E.2d 310, 312-13 (1974) ["Where the issue is whether a State officer has refused to disburse appropriated funds according to law, and the relief sought is an injunction directing that those funds be released in accordance with the appropriation, the action is not one against the State. [Citations omitted]."]; *Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 188, 470 N.E.2d 1029, 1039 (1984) ["[W]here the defendant officer acted in excess of his statutory authority, the rights of the plaintiffs to be free from the consequences of his action outweigh the interests of the State which is served by the

sovereign immunity doctrine."]; *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill.2d 540, 548, 370 N.E.2d 223, 227 (1977)

> A challenge is also made on the grounds that plaintiff's action is barred by the doctrine of sovereign immunity. It is argued that, in essence, this action is one against the State, seeking to have it continue to do business with plaintiff. Plaintiff is not attempting to enforce a present claim against the State but, rather, seeks to enjoin defendant from taking actions in excess of his delegated authority and in violation of plaintiff's protectible legal interests. Such a suit does not contravene the immunity prohibition. [Citations omitted]. For reasons the same as expressed above, we also reject defendant's contention that the Court of Claims has exclusive jurisdiction over the subject matter of this action.

Healy v. Vaupel, 133 Ill.2d 295, 308, 549 N.E.2d 1240, 1247 (1990) ["Sovereign immunity affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court."].)

In the context of the Eleventh Amendment, and the interplay between the national and the state governments, this Court has also permitted suits seeking prospective relief against state officers in order to end continuing violations of federal law. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and its progeny, incorporate into Eleventh Amendment jurisprudence the same analytical

underpinnings of the Illinois "officer suit" exception in the context of injunction actions against state officials purporting to act in excess of their authority. Although the issue presented in this case relates to a state court's application of state sovereign immunity law, the underpinning of the "officer suit" exception (referenced in the Illinois Supreme Court's opinion, Pet. App. 13a) is the fundamental unfairness of insulating *ultra vires* state conduct from the judicial branch through the doctrine of sovereign immunity.

In both contexts, the courts have engaged in a syllogism—the officer suit exception—to allow parties like petitioners an opportunity to have their claims heard and considered. The officer suit exception is an after-the-fact definitional justification for a departure from a doctrine that would otherwise lead to an unfair result—because the State is presumed to follow the law, the courts conclude that a person, acting nominally on behalf of the State but who departs from the law, must be, by definition, acting outside the scope of authority as a State agent. As such, a suit claiming that the nominal state agent acted in a way that the law does not condone is viewed as something other than a suit against the State for purposes of sovereign immunity, even though the relief will be directed against the State, and the suit relates to the rights of the State.

This construct of the law derives from the courts, and it has been a settled and accepted construct for decades, even though it is, at root, a circular argument—if the State official complied with the requirements of law, there would be no liability if the merits of the controversy were decided, but the matter could be decided on the jurisdictional grounds of sovereign immunity; however, if the state official departed from the requirements of law, such that liability would

otherwise attach but for the doctrine of sovereign immunity, the sovereign immunity doctrine is set aside in favor of the officer suit exception. In either event, the determination of jurisdiction turns first and foremost on the merits of the controversy, and sovereign immunity is effectively diminished to a label—if the claimant's case has merit, the doctrine will not apply, but, if the claim lacks merit, the case will not be entertained, as opposed to being rejected on the merits of the claim.

The non-constitutional doctrine of sovereign immunity cannot properly be asserted to avoid obligations arising under contract, especially in the context of commercial transactions undertaken in the name or on behalf of the State. Petitioners' rights under their contract are property rights that vested in petitioners upon formation of the contract. The contract—sale of commercial paper—was a purely commercial transaction, pursuant to which the Illinois Treasurer, as part of her state constitutional responsibilities, determined to exchange two Note assets in the State's investment portfolio for cash. There is no question that the United States Constitution recognizes and expresses a value, at the constitutional level, in the recognition and enforcement of otherwise lawful contracts—indeed, the Constitution expressly prohibits the States from passing any law impairing the obligation of contracts (Const., Art. I, § 10), and petitioners respectfully submit that the constitutional recognition of the enforceability of otherwise lawful contracts should, at a minimum, inform and provide the context against which a non-constitutional doctrine of sovereign immunity ought to be measured.

It is a fundamental element of due process that a party enjoy some meaningful remedy against a threat to that party's

property rights, but, in this case, petitioners have been denied any remedy. The adjudicative body established by state statute to provide compensation in damages for contract claims against the state does not have the power to entertain suits seeking equitable remedies in furtherance of contract enforcement, while the common law courts of the state, which traditionally provide a forum in which to determine claims seeking prospective relief against state officers who refuse to act in compliance with their lawful duties, are no longer available to redress petitioners' claims.

In another context, this Court stated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 643, 105 S. Ct. 2265, 2277, 85 L. Ed. 2d 652 (1985),

> But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Bates v. State Bar of Arizona*, [433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)] 433 U.S. at 376, 97 S. Ct. at 2705. That our citizens have access to their civil courts is not an evil to be regretted; rather, *it is an attribute of our system of justice in which we ought to take pride.*

(Emphasis added). Here, however, citizens have been denied access to their civil courts, and, respectfully, petitioners ask this Court to correct that deprivation of their rights.

CONCLUSION

The petition for a writ of certiorari should be granted because the Illinois Supreme Court's judgment and application of state law concepts of sovereign immunity served to deny petitioners their constitutional rights to due process.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ILLINOIS FILED JUNE 3, 2005 AND PETITION FOR REHEARING DENIED SEPTEMBER 26, 2005

SUPREME COURT OF ILLINOIS

Nos. 96250, 96294

June 3, 2005

Rehearing Denied Sept. 26, 2005

PHL, INC., *et al.*,

Appellees,

v.

PULLMAN BANK AND TRUST COMPANY et al.
(Judy Baar Topinka, Treasurer, Appellant).

PHL, Inc., *et al.*,

Appellees,

v.

Pullman Bank and Trust Company *et al.*
(Pullman Bank and Trust Company, Appellant).

Appendix A

CHIEF JUSTICE McMORROW delivered the opinion of the court:

Section 8(b) of the Court of Claims Act provides that the Court of Claims shall have exclusive jurisdiction over "[a]ll claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b) (West 2000). At issue in this case is whether plaintiffs' claim for breach of contract, which was brought against the Treasurer of the State of Illinois, constitutes an action "against the State" so as to come within this provision. The appellate court concluded that it did not. No. 5-00-0206 (unpublished order under Supreme Court Rule 23). For the reasons that follow, we reverse.

BACKGROUND

In 1982, the State of Illinois established the Illinois Insured Mortgage Pilot Program (Mortgage Program) in an effort to stimulate economic development within the state. Although the workings of the Mortgage Program are somewhat complicated, it may be said, in general, that the program was implemented through the creation of a trust, funded with state money, from which loans were made to various commercial enterprises that had difficulty obtaining conventional financing.[1]

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1. The original investment of state funds for the Mortgage Program trust was made under section 22 1/2 of the Deposit of State Moneys Act (Ill.Rev.Stat.1983, ch. 130, par. 41a), a general provision which, at that time, authorized the state Treasurer, with the approval of the Governor, to invest state funds in programs such as the Mortgage Program trust.

Appendix A

The details of the Mortgage Program, including the terms governing the creation of the trust and the manner in which loans were to be made by the trustee, were embodied in a purchase agreement, a trust indenture and a servicing agreement (collectively, the Trust Agreement). The Trust Agreement was executed on July 14, 1982, by the State of Illinois, acting through Treasurer Jerome Cosentino, with the concurrence of Governor James Thompson, and American National Bank and Trust Company of Chicago, both individually and as trustee. Under the terms of the Trust Agreement, the state is the sole owner of the trust estate and, through the Treasurer, directs the trust's activities.

In November 1982, in connection with the Mortgage Program, a first mortgage loan in the amount of $13.4 million was made to an Illinois limited partnership known as the Collinsville Hotel Venture. The funds from the loan were used by the partnership to finance a hotel in Collinsville, Illinois, which is now known as the Collinsville Holiday Inn. In December 1983, a first mortgage loan was made to another limited partnership, known as the President Lincoln Hotel Venture, in the amount of $15.5 million. The funds from this loan were used to finance the construction of a hotel in Springfield, Illinois, which is now known as the Springfield Renaissance Hotel.

Throughout the 1980s, both hotel ventures had difficulties meeting their obligations under the Mortgage Program loans. As a result, both loans were restructured on at least two occasions. In 1992, a dispute arose between the hotel ventures and then-Treasurer Patrick Quinn regarding a term of the restructured loan agreements which required each

hotel venture to provide the Mortgage Program trustee with a yearly "reliance letter." The trustee and Treasurer threatened to declare the loans in default because they believed that the reliance letters they had received were inadequate. In response, the hotel ventures filed suit against the Treasurer and trustee to enjoin the declaration of default.

The circuit court of Cook County dismissed the hotel ventures' action based on the doctrine of sovereign immunity. In October 1994, the appellate court affirmed. See *President Lincoln Hotel Venture v. Bank One*, 271 Ill.App.3d 1048, 208 Ill.Dec. 376, 649 N.E.2d 432 (1994). The hotel ventures' request for rehearing in the appellate court was denied on May 5, 1995. Thereafter, the hotel ventures filed a petition for leave to appeal in this court, which remained pending until October 1995.

In November 1994, defendant Judy Baar Topinka was elected Treasurer of the State of Illinois. After assuming office, Treasurer Topinka installed defendant Pullman Bank and Trust Company (Pullman Bank) as trustee of the Mortgage Program trust.

Beginning in December 1994, and continuing through the first part of 1995, the hotel ventures engaged in discussions with Treasurer Topinka about the possibility of purchasing the hotel venture loans from the state. The terms of sale which were discussed included the settlement of the reliance letter litigation, which was still ongoing at that time. As a result of these discussions, the plaintiffs in this case, which are two entities described in the record as having a "business relationship" with the hotel ventures, agreed to

purchase the hotel venture loans. Plaintiff PHL, Inc., agreed to buy the first mortgage loan relating to the Collinsville Holiday Inn for $6.3 million, while plaintiff The President Lincoln Hotel Corporation agreed to pay $3.7 million to acquire the first mortgage loan relating to the Springfield Renaissance Hotel.

On April 19, 1995, plaintiffs entered into separate buy-sell agreements with Pullman Bank, as trustee of the Mortgage Program trust, to purchase the hotel venture loans. The agreements were identical, except for the name of the buyer and the purchase price. Joinders to the agreements were signed by the hotel ventures and Treasurer Topinka. Both buy-sell agreements expressly stated that they were being entered into, in part, to settle the reliance letter litigation and both agreements contained provisions in which the state agreed not to pursue any claims against the hotel ventures in relation to the loans. Closing on the buy-sell agreements was set for June 1995.

After the Treasurer and trustee signed the buy-sell agreements, Attorney General Jim Ryan publicly stated that he would review the terms of the agreements. In July 1995, the Attorney General announced that he would not approve the buy-sell agreements.

The Attorney General's decision to withhold approval of the agreements rested on two grounds, the first of which was financial. In a report prepared by a group of University of Illinois professors, the combined value of the two hotel venture loans was estimated at approximately $18 million to $19 million. Thus, because the state was to receive a total of

only $10 million under the buy-sell agreements, the Attorney General concluded that the consideration the state was to receive for the hotel venture loans and the settlement of the reliance letter litigation was inadequate.

The second reason the Attorney General gave for withholding approval of the buy-sell agreements was found in an opinion letter issued by the Attorney General on July 10, 1995. See 1995 Ill. Att'y Gen. Op. No. 95-003. In this opinion, the Attorney General observed that the Trust Agreement, as it then existed, did not authorize the Mortgage Program trustee to settle mortgage loans for an amount less than their full value. The buy-sell agreements, however, did so. Therefore, the Attorney General concluded, unless the Trust Agreement was amended, at the direction of the state, the trustee would have no authority to surrender or execute the documents necessary to close on the buy-sell agreements.

The Attorney General's opinion further observed that the Trust Agreement did not specify who may execute the consent to amend the Trust Agreement on behalf of the state, nor the form the consent should take. The Attorney General noted, however, that the Governor's involvement was "indispensable to the creation and ongoing operation" (1995 Ill. Att'y Gen. Op. No. 95-003, at 7) of the Mortgage Program and, further, "that in 1992, when a similar outstanding loan was settled, the Governor's signature was affixed to the direction authorizing the Trustee to execute the instruments necessary to accept the settlement." 1995 Ill. Att'y Gen. Op. No. 95-003, at 7-8. Moreover, according to the Attorney General, the Trust Agreement itself provides "that the parties to the Agreement include the Trustee and the State of Illinois,

which is described as 'acting by and through its Treasurer ***, with the consent of its Governor ***.'" 1995 Ill. Att'y Gen. Op. No. 95-003, at 8. From this, the Attorney General concluded that

> "it was clearly contemplated by the parties that the representatives of the State, for purposes of acting under the Trust Agreement, are the Treasurer and the Governor, and that the concurrence of both the Governor and the Treasurer is necessary to validate actions taken on behalf of the State thereunder. Consequently, it is my opinion that both the Governor and the Treasurer must authorize the amendment of the Trust Agreement and give their consent to the proposed transaction in order to effectuate it." 1995 Ill. Att'y Gen. Op. No. 95-003, at 9.

Because the Governor had not authorized any amendment of the Trust Agreement or consented to the buy-sell agreements, the Attorney General concluded that the agreements were invalid.

After the Attorney General made his views on the buy-sell agreements known, Treasurer Topinka publicly indicated that she disagreed with the Attorney General's financial assessment of the agreements. The Treasurer stated that, in her view, the buy-sell agreements represented the best financial deal that could be made by the state with respect to the hotel venture loans. Nevertheless, based on the legal opinion of the Attorney General, and because the Governor

had not consented to the buy-sell agreements, the Treasurer declined to close on the agreements.

In October 1995, the hotel ventures, the Treasurer, Pullman Bank as the Mortgage Program trustee, and the Attorney General executed an agreement settling the reliance letter litigation. Plaintiffs in the case at bar were not parties to this settlement, which did not reference the buy-sell agreement or any sale of the hotel venture loans. The same day that the settlement agreement was reached, the hotel ventures withdrew their petition for leave to appeal in the reliance letter litigation which was pending before this court. See *President Lincoln Hotel Venture v. Pullman Bank & Trust Co.*, 163 Ill.2d 586, 212 Ill.Dec. 436, 657 N.E.2d 637 (1995) (petition for leave to appeal withdrawn).

Approximately two months after the settlement of the reliance letter litigation, on December 29, 1995, plaintiffs filed the present action in the circuit court of Madison County against the Treasurer and Pullman Bank. In their complaint, plaintiffs alleged that the Treasurer possessed the "unqualified constitutional authority" to approve the sale of the hotel venture loans without the concurrence of the Governor. Plaintiffs further alleged that, by adhering to the Attorney General's legal opinion and failing to close on the buy-sell agreements, the Treasurer was "acting in derogation of her constitutional duties and in abuse of her discretion and authority." Plaintiffs requested the circuit court to "[o]rder the Treasurer to perform her constitutional duties" and to enforce the provisions of the buy-sell agreements calling for the state to sell the hotel venture loans.

Appendix A

The litigation which followed the filing of plaintiffs' suit was lengthy and involved. It is recounted here only as necessary to address the issues presented in this appeal.

After plaintiffs filed their complaint, both the Treasurer and Pullman Bank filed motions to dismiss, in which they argued that plaintiffs' cause of action was barred by sovereign immunity. Defendants maintained that, although plaintiffs' suit for breach of contract was brought against the Treasurer in her individual capacity, the state was in fact the real party in interest because a judgment in favor of plaintiffs would require the state to divest itself of the hotel ventures loans. In addition, because Pullman Ba..k was merely the agent of the state and could only act at the direction of the Treasurer with respect to the trust estate, defendants maintained that any action against Pullman Bank was also against the state. Defendants further noted that, under section 8(b) of the Court of Claims Act (705 ILCS 505/8(b) (West 2000)), the Court of Claims has exclusive jurisdiction over claims brought against the state for breach of contract. Thus, defendants argued that the circuit court lacked jurisdiction to hear plaintiffs' complaint and that the suit properly belonged in the Court of Claims. The circuit court denied defendants' motions to dismiss.

Thereafter, the Treasurer filed a motion for summary judgment in which she argued that the buy-sell agreements were unenforceable as a matter of law both because the Governor had not consented to them and because they lacked the Attorney General's approval. This latter argument was based on the fact that the buy-sell agreements were not simply contracts, but also settlement agreements which conclusively

resolved the then-pending reliance letter litigation. Citing to *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority*, 98 Ill.2d 58, 74 Ill.Dec. 548, 456 N.E.2d 50 (1983), the Treasurer maintained that it is the prerogative of the Attorney General to settle pending litigation in which the state is involved. Thus, according to the Treasurer, because the Attorney General had not consented to the settlement portions of the buy-sell agreements, the settlement was invalid. And, the Treasurer argued, because the settlement of the reliance litigation was a material covenant to the buy-sell agreements, the agreements themselves never became valid contracts and were therefore unenforceable. Pullman Bank also filed a motion for summary judgment which raised similar arguments.

In response to defendants' motions, plaintiffs filed a cross-motion for summary judgment, in which they argued that the Treasurer had the exclusive authority to close on the buy-sell agreements and that the Attorney General's approval of the buy-sell agreements was unnecessary. Plaintiffs did not dispute defendants' contention that, in general, it is the prerogative of the Attorney General to settle state litigation. However, plaintiffs argued that, in this case, the settlement of the reliance letter litigation in October 1995, although separate from the buy-sell agreements, nevertheless rendered the settlement portions of the buy-sell agreements irrelevant. Accordingly, because the settlement portions of the buy-sell agreements were no longer at issue, plaintiffs maintained that the Attorney General's approval was not needed and that the court could order specific performance of the buy-sell agreements.

Appendix A

After hearing argument, the circuit court denied defendants' motions for summary judgment and granted plaintiffs' cross-motion. In so ruling, the circuit court held that consent of neither the Governor nor the Attorney General was necessary to render the buy-sell agreements enforceable. In a subsequent order, the court held that plaintiffs had been ready, willing and able to fulfill their obligations under the buy-sell agreements in June 1995. Finally, on March 13, 2000, the circuit court entered judgment in favor of plaintiffs. The court ordered the Treasurer and Pullman Bank, as trustee of the Mortgage Program trust, to specifically perform the buy-sell agreements. Defendants appealed.

In a divided opinion, the appellate court affirmed. No. 5-00-0206 (unpublished order under Supreme Court Rule 23). The appellate court rejected defendants' contention that plaintiff's suit was barred by sovereign immunity. In so holding, the appellate court observed that an exception to the doctrine of sovereign immunity applies when the state officer who is the subject of the complaint acts in excess of his or her authority. The appellate court reasoned that this exception was applicable in the case at bar because the Treasurer had "back[ed] out of an obligation based on an opinion of the Attorney General" and, in so doing, had improperly "relegat[ed]" her constitutional authority as Treasurer to the Attorney General.

Both defendants filed separate petitions for leave to appeal in this court. The petitions were allowed and defendants' appeals were consolidated.

Appendix A

ANALYSIS

The Illinois Constitution of 1970 abolished the doctrine of sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. Pursuant to its constitutional authority, the General Assembly reestablished sovereign immunity in the State Lawsuit Immunity Act. 745 ILCS 5/0.01 *et seq.* (West 1998); *City of Springfield v. Allphin*, 74 Ill.2d 117, 123, 23 Ill.Dec. 516, 384 N.E.2d 310 (1978). Section 1 of that enactment states that "[e]xcept as provided in [an act] to create the Court of Claims * * * the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (West 1998). The Court of Claims Act, in turn, provides that the Court of Claims shall have exclusive jurisdiction over "[a]ll claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b) (West 2000).

As they did in the courts below, defendants maintain that plaintiffs' complaint is barred from the circuit court by section 8(b) of the Court of Claims Act. Defendants contend that plaintiffs' complaint is one for breach of contract; that Pullman Bank may act only at the direction of the Treasurer and, therefore, the Treasurer's actions are the relevant focus of inquiry in this case; that the complaint against the Treasurer is, in fact, against the state because a judgment in plaintiffs' favor would "operate to control the actions of the State" (emphasis omitted) (*Currie v. Lao*, 148 Ill.2d 151, 158, 170 Ill.Dec. 297, 592 N.E.2d 977 (1992)) by forcing the state to sell the hotel venture loans; and, therefore, that plaintiffs' complaint must be heard in the Court of Claims.

Appendix A

Plaintiffs, in response, do not dispute that their complaint alleges a breach of contract, that the Treasurer's actions should be the focus of this appeal, or that an adjudication in their favor would cause the state to sell the hotel venture loans. Nevertheless, plaintiffs contend that section 8(b) is not controlling in the case at bar because an exception to the doctrine of sovereign immunity, often referred to as the "officer suit" exception, is applicable here.

In Illinois, the leading historical expression of the officer suit exception is found in *Schwing v. Miles*, 367 Ill. 436, 11 N.E.2d 944 (1937):

> "where the action at law or suit in equity is maintained against a State officer or the director of a department on the ground that, while claiming to act for the State, he violates or invades the personal and property rights of the plaintiff under an unconstitutional act, or under an assumption of authority which he does not have, such suit is not against the State. *(Noorman v. Department of Public Works and Buildings, supra* [366 Ill. 216, 8 N.E.2d 637 (1937)]; *Fitts v. McGhee*, 172 U.S. 516 [19 S.Ct. 269, 43 L.Ed. 535]; *United States v. Lee*, 106 id. 196 [106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171]; *White Eagle Oil and Refining Co. v. Gunderson* [48 S.D. 608], 205 N.W. (S.Dak.) 614; 43 A.L.R. 397.) The presumption obtains that the State, or a department thereof, will not, and does not, violate the constitution and laws of the State, but that such violation, if it occurs, is by a State officer or the head of a department of the State,

> and such officer or head may be restrained by proper action instituted by a citizen." *Schwing*, 367 Ill. at 441-42, 11 N.E.2d 944.

Stated otherwise, it is said that when an action of a state officer is undertaken without legal authority, such an action "strips a State officer of his official status * * * [and] his conduct is not then regarded as the conduct of the State, nor is the action against him considered an action against the State." *Moline Tool Co. v. Department of Revenue*, 410 Ill. 35, 37, 101 N.E.2d 71 (1951).

The officer suit exception has a long and complex history, with its origination in the federal courts. See *Schwing*, 367 Ill. at 441, 11 N.E.2d 944, citing *Fitts v. McGhee*, 172 U.S. 516, 19 S.Ct. 269, 43 L.Ed. 535 (1899); *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); see also *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In Illinois, the officer suit exception has been described as a means of protecting the rights of plaintiffs:

> "[W]here the defendant officer act[s] in excess of his statutory authority, the rights of the plaintiffs to be free from the consequences of his action outweigh the interest of the State which is served by the sovereign immunity doctrine." *Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 188, 83 Ill.Dec. 609, 470 N.E.2d 1029 (1984).

See also *Moline Tool Co.*, 410 Ill. at 37, 101 N.E.2d 71 (not all suits against state officers are barred because "[s]uch a holding would have blunted the effectiveness of many

constitutional guaranties by preventing their judicial enforcement").

In *Smith v. Jones*, 113 Ill.2d 126, 100 Ill.Dec. 560, 497 N.E.2d 738 (1986), this court held that the officer suit exception may be raised, as a general matter, in breach of contract cases which would otherwise fall under section 8(b) of the Court of Claims Act. *Smith*, 113 Ill.2d at 131-32, 100 Ill.Dec. 560, 497 N.E.2d 738. However, this court also held that the exception does not apply when the action which the plaintiff alleges was taken in excess of authority is simply a breach of contract and nothing more. *Smith*, 113 Ill.2d at 132-33, 100 Ill.Dec. 560, 497 N.E.2d 738 ("The plaintiffs[']complaint, thus, alleges only that the Director exceeded his authority by breaching a contract. Such an allegation does not deprive the defendants of the protection of the bar of sovereign immunity"). In the case at bar, defendants cite to *Smith* and contend that plaintiffs' cause of action is merely a breach of contract case and, therefore, that the officer suit exception is inapplicable.

Plaintiffs, however, maintain that the present case is unlike *Smith*. According to plaintiffs, in this case, the Treasurer did not simply breach a contract, she also acted in excess of her legal authority, specifically, the authority given her under article V, section 18, of the Illinois Constitution of 1970. That provision states:

> "The Treasurer, in accordance with law, shall be responsible for the safekeeping and investment of monies and securities deposited with him, and for their disbursement upon order of the Comptroller." Ill. Const. 1970, art. V, § 18.

Appendix A

Plaintiffs allege in their complaint that the Treasurer acted "in derogation of her constitutional duties" under article V, section 18, by "adhering to the Attorney General's financial analysis and legal opinion." Thus, plaintiffs contend, the officer suit exception applies and their complaint properly belongs in the circuit court.

Initially, we note that the Treasurer did not, in fact, adhere to the Attorney General's financial analysis of the buy-sell agreements. Indeed, there has never been any question in this case that, after the Attorney General announced the findings from the report prepared by the University of Illinois professors, the Treasurer publicly stated that, in her view, the buy-sell agreements were the best financial deal that could be made for the state with respect to the hotel venture loans. The circuit court, in its order on the parties' cross-motions for summary judgment, stated as an "undisputed fact" that "[t]he parties never closed on the Buy-Sell Agreements or the related Settlement Agreements because, on advice of the Attorney General, the Treasurer refused to do so." On appeal, the appellate court agreed, stating that "[a]fter entering into the Agreements, the Treasurer declined to act, based upon the advice contained in an opinion letter." No. 5-00-0206 (unpublished order under Supreme Court Rule 23). The lower courts' statements of the facts are not contested by the parties on appeal. Thus, with respect to whether the Treasurer acted "in derogation of her constitutional duties," the question we must decide is whether the Treasurer's decision to "adher[e] to the Attorney General's * * * legal opinion" violated article V, section 18, of the Illinois Constitution. The answer to this question is no.

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Article V, section 18, is a general grant of authority. Nothing in that provision forbids the Treasurer from receiving or following the advice of the Attorney General on a legal matter relating to the proper interpretation of trust documents. Accordingly, the fact that the Treasurer, in this case, chose to adopt the Attorney General's legal opinion interpreting the Trust Agreement as her own does not mean that she acted outside the authority given to her under the constitution.[2]

Plaintiffs nevertheless express concern that a holding in this case that the Treasurer did not violate the constitution would mean that the Attorney General would have "veto authority over the Treasurer's right to enter into contracts to sell state investments." We disagree. As noted, in July 1995, the Attorney General issued an opinion letter in which he reasoned that the buy-sell agreements were invalid because, in order for those agreements to take effect, an amendment

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2. The dissent states that the Treasurer disagreed with the Attorney General's opinion letter and that she "publicly characterized the opinion as 'illogical' and 'unrealistic.'" 216 Ill.2d at 277, 296 Ill.Dec. at 843, 836 N.E.2d at 366 (Freeman, J., dissenting). Although the dissent does not indicate the source of the Treasurer's statements, it appears that the dissent has taken them from an allegation found in plaintiffs' complaint and that the allegation has been misquoted. In paragraph 40 of their complaint, plaintiffs alleged that "on July 11, 1995, the Treasurer issued a press release stating that the *University of Illinois report* was 'illogical' and 'unrealistic.'" (Emphasis added.) Paragraph 40 alleges that the Treasurer disagreed with the financial assessment offered by the University of Illinois professors, not that the Treasurer disagreed with the Attorney General's opinion letter. In addition, the press release described in plaintiffs' complaint was not mentioned in any of the circuit court's subsequent rulings and we have been unable to locate it in the record.

to the Trust Agreement was required and such an amendment could not be made, under the terms of the Trust Agreement itself, without the consent of the Governor. From the Treasurer's perspective, the Attorney General's opinion was persuasive authority but it was not legally binding. See *President Lincoln Hotel Venture*, 271 Ill.App.3d at 1056, 208 Ill.Dec. 376, 649 N.E.2d 432; *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 399, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994). The opinion did not, in a legal sense, stop or block the Treasurer from taking any action she wished with respect to the buy-sell agreements. The Treasurer, of her own volition, decided to follow the legal advice of the Attorney General and forgo closing on the buy-sell agreements. Nothing in our decision in this case forces the Treasurer to adopt the advice of the Attorney General or gives the Attorney General the authority to unilaterally invalidate contracts entered into by the Treasurer. Our holding is simply that when, as in this case, the Treasurer chooses to follow the legal advice of the Attorney General regarding the proper interpretation of trust documents, the Treasurer does not violate article V, section 18.[3]

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3. The dissent states that the Treasurer's decision to forgo closing on the buy-sell agreements was not "voluntary" (216 Ill.2d at 277, 296 Ill.Dec. at 843, 836 N.E.2d at 366 (Freeman, J., dissenting)) and repeatedly asserts that the Attorney General "would not *allow*" the Treasurer to proceed with the buy-sell agreements (emphasis in original) (216 Ill.2d at 275-79, 296 Ill.Dec. at 842-43, 836 N.E.2d at 365-66. (Freeman, J., dissenting)). Notably, however, the dissent never identifies the means by which the Attorney General prevented the Treasurer from closing on the agreements. The closest the dissent comes to doing so is the dissent's statement that the "Attorney General placed the Treasurer in a situation where she was

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In addition, we note that were we to hold that the officer suit exception applies in this case, it would follow that every time the Treasurer decided to adopt any legal advice she would risk violating the constitution. Indeed, counsel for plaintiffs essentially conceded this point during oral argument before this court. Explaining why plaintiffs believe the Treasurer acted improperly in this case, counsel stated that "the Treasurer had a responsibility not to allow the Attorney General to dissuade her from her contract." But this assertion is unreasonable. The Treasurer should not be placed in the position of having to refuse to hear legal advice in order to avoid violating the constitution. Important decisions affecting the finances of this state should not have to be made in a legal vacuum.

The appellate court below, in discussing whether the Treasurer had exceeded her constitutional authority, concluded that the Treasurer's argument that the buy-sell agreements were ineffective without the Governor's consent was incorrect, as was her contention that the Attorney General's approval was necessary because the buy-sell agreements settled the reliance letter litigation. Based on

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(Cont'd)

forced to choose between doing her job, *i.e.*, exercising her judgment on financial matters with respect to the Trust, or following the unsought advice of a fellow state officer." 216 Ill.2d at 276, 296 Ill.Dec. at 842, 836 N.E.2d at 365. (Freeman, J., dissenting). In other words, according to the dissent, the Treasurer's actions were not "voluntary" because she had to decide whether or not to follow the Attorney General's legal opinion. This reasoning is unpersuasive. If the Treasurer chose to follow the Attorney General's legal opinion, then, by definition, her actions were voluntary.

these conclusions, the appellate court determined that the Treasurer had exceeded her constitutional authority because, as the appellate court stated, she had no authority *not* to execute the buy-sell agreements. Again, we disagree.

It is well settled that a state officer's erroneous exercise of a broad grant of delegated authority does not constitute an *ultra vires* act. As the United States Supreme Court has stated:

> "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. *A claim of error in the exercise of that power is therefore not sufficient.*" (Emphasis added.) *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628, 1636 (1949).

In the case at bar, we express no opinion on whether the Governor's consent was, in fact, required to effectuate the buy-sell agreements or whether the Attorney General's approval of the agreements was needed because the agreements settled litigation in which the state was involved.

We note, however, that even accepting the appellate court's holdings on these issues as correct, the most that can be said with respect to the Treasurer's actions is that (1) she misread the terms of the Trust Agreement as requiring the Governor's consent for an amendment to that agreement when such consent was not, in fact, required and (2) she incorrectly believed that the settlement provisions contained in the buy-sell agreements were material covenants to those agreements when, in fact, the provisions were rendered irrelevant by the settlement of the reliance letter litigation in October 1995. These are errors of contract and trust interpretation. They are not actions forbidden under *article V, section 18*, and, hence, they are not *ultra vires* acts.

The parties also contest whether plaintiffs' cause of action is one which seeks prospective relief within the meaning of this court's decision in *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill.2d 540, 12 Ill.Dec. 600, 370 N.E.2d 223 (1977). As this court has noted, *Bio-Medical Laboratories* "stands for the proposition that if a plaintiff is not attempting to enforce a present claim against the State, but rather seeks to enjoin a State officer from taking future actions in excess of his delegated authority, then the immunity prohibition does not pertain." *Ellis v. Board of Governors of State Colleges & Universities*, 102 Ill.2d 387, 395, 80 Ill.Dec. 750, 466 N.E.2d 202 (1984); see also *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (drawing a distinction between prospective and retrospective relief in the context of sovereign immunity). Plaintiffs contend that their cause of action is not a present claim because they seek only to compel the Treasurer to take future action, *i.e.*, to close on the buy-sell agreements. Defendants, however,

maintain that because plaintiffs' action is one for breach of contract, it necessarily seeks to enforce current or existing agreements. Thus, according to defendants, plaintiffs' cause of action cannot be viewed as simply seeking prospective relief.

The rule stated in *Bio-Medical Laboratories* is that sovereign immunity will not bar a cause of action in the circuit court where the plaintiff seeks to bar "a State officer from taking future actions *in excess of his delegated authority.*" (Emphasis added.) *Ellis*, 102 Ill.2d at 395, 80 Ill.Dec. 750, 466 N.E.2d 202. Because we have determined that, in this case, the Treasurer did not take any action in excess of her delegated, constitutional authority, we need not consider whether plaintiffs' cause of action is a present claim or one which seeks prospective relief.

Finally, the dissent states that it is troubled by this court's approach to the question of "whether the Court of Claims can provide the remedy of specific performance." 216 Ill.2d at 282, 296 Ill.Dec. at 846, 836 N.E.2d at 369 (Freeman, J., dissenting). The dissent states that "[i]t would appear from the conclusion reached by this court that the implicit answer to that question is yes." 216 Ill.2d at 282, 296 Ill.Dec. at 846, 836 N.E.2d at 369. (Freeman, J., dissenting). This statement is incorrect. Nowhere in this opinion has this court made any determination, either explicit or implicit, as to whether the remedy of specific performance is available in the Court of Claims. Our decision in this case is limited solely to the question of whether the circuit court had jurisdiction to consider plaintiffs' complaint and, specifically, whether the officer suit exception is applicable in this case. The parties

have not briefed the issue of whether the remedy of specific performance is available in the Court of Claims, and it is not necessary to decide that issue in order to resolve this case.

CONCLUSION

The officer suit exception to the doctrine of sovereign immunity is inapplicable under the facts of this case. Thus, section 8(b) of the Court of Claims Act is controlling, and the circuit court lacked jurisdiction to hear plaintiffs' complaint. Accordingly, the judgments of the circuit and appellate courts are reversed. The cause is remanded to the circuit court with directions to dismiss plaintiffs' complaint.

Nos. 96250 & 96294—Appellate court judgment reversed; circuit court judgment reversed; cause remanded with directions.

JUSTICES GARMAN and KARMEIER took no part in the consideration or decision of this case.

Appendix A

Justice FREEMAN, dissenting:

The court reverses the judgments of the appellate and circuit courts in this case, which held that jurisdiction over this cause rested in the circuit court of Madison County. I am unable to join in the opinion, however, because I believe several of the more troubling aspects of this case have been overlooked in the court's haste to rule that jurisdiction lies not in the circuit court but in the Court of Claims. In my view, the court's conclusory analysis with respect to the issue of sovereign immunity is at odds with the spirit of the officer suit exception to the doctrine of sovereign immunity. I believe today's opinion will have a negative impact on the future willingness of private citizens to do business in Illinois with state officials and therefore respectfully dissent.

The sovereign immunity issue was first raised in the circuit court in a motion to dismiss filed by defendants. The trial judge denied the motion because he believed that the case involved an inseparable combination of contractual and constitutional issues, which were inappropriate issues for the Court of Claims to decide. The appellate court agreed, holding that, *inter alia*, "[s]overeign immunity cannot provide a defense where the court must determine if a State agent acted in violation of statutory or constitutional law or in excess of authority." *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064, 297 Ill.App.3d 1142, 250 Ill.Dec. 96, 737 N.E.2d 718 (July 28, 1998) (unpublished order under Supreme Court Rule 23).

The genesis of this suit was the 1982 establishment of the Illinois Insured Mortgage Pilot Program (Mortgage

Program), which, as the court correctly notes, was designed to stimulate economic development in depressed areas within central and downstate Illinois. State monies were used to create a trust, which would lend money to various commercial enterprises that had experienced difficulty obtaining conventional financing. The trust agreement at issue in this case was executed by the State of Illinois, with the Treasurer directing the trust's activities. Relevant here is the fact that the Treasurer was charged under this statutory program with the responsibility of overseeing the state's investment.

In November 1982 and December 1983, two loans were made pursuant to the Mortgage Program to different hotel ventures. Unfortunately during the years that ensued, these borrowers had difficulty in meeting their financial obligations under the Mortgage Program loans. The terms of the loans were eventually restructured, but new disputes subsequently arose over the terms of the restructuring. As a result of the disputes, in 1994, plaintiffs began discussions with Treasurer Judy Baar Topinka regarding the possibility of purchasing the loans from the state. These discussions led to the creation of the buy-sell agreements that are at the heart of this case. The Treasurer and the trustee signed the buy-sell agreement on April 19, 1995. At that time, the Treasurer held a news conference where she explained the agreement and the benefits it would inure to the state. According to the terms of the agreements, the closing date was to be on or before June 30, 1995.

Shortly thereafter, on May 3, 1995, the Illinois Attorney General announced that he would investigate the propriety of the Treasurer's selling of the loans to plaintiffs and that

the proposed closing would not take place until his review was completed. During the tenure of the "investigation," plaintiffs were told of the actions of the Attorney General with respect to his intervention into the buy-sell agreements and of the fact that the Treasurer "was acquiescent in the Attorney General's assertion that *he would make the ultimate decision related to her right to proceed with the buy-sell agreements.*" Affidavit of Kathleen Vyborny, Defendants' Appendix, at A-117. The final day for the closing, June 30, 1995, passed without action.

On July 11, 1995, the Attorney General announced that he would not "approve" the agreements based upon the financial advice of a team of University of Illinois professors. On that same date, he also sent an opinion to State Senator Penny Severns in which he took the position that the Treasurer does not have "the authority to create a program of this sort, which extends to matters far in excess of the Treasurer's statutory and constitutional duties." 1995 Ill. Att'y Gen. Op. No. 95-003, at 6. The Treasurer publicly disagreed with the Attorney General's financial assessment of the agreements because, in her view, the agreements represented the best financial deal that could be made by the state with respect to the initial hotel venture loans. According to the record, the proposed sale was 20% higher than any other offer received for the loans, 30% higher than the June 1994 appraised value of the loans, and 50% higher than the book value of those loans. As a result of the Attorney General's opinion, the deal was considered "dead." Letter of Chief of Staff of the Attorney General, dated July 11, 1995, Defendants' Appendix, at A-112. In a letter to plaintiffs' attorney, the Attorney General spoke of the need to look to

the future in light of the fact that the deal was dead and that "to that end, and to aid this office in an analysis of the current status of the agreement of or any future proposal, please consider this our request to you, on behalf of your clients, to allow us the opportunity to examine the books and expense records of both hotels." Letter of Chief of Staff of the Attorney General, dated July 11, 1995, Defendants' Appendix, at A-112. Soon thereafter, this lawsuit commenced.

Plaintiffs argue that the Treasurer acted in derogation of her constitutional duties in refusing to perform her agreement to divest the state's holdings with respect to the hotel ventures after entering into binding agreements to do so. Defendants respond that the doctrine of sovereign immunity deprives the circuit court of jurisdiction over this cause. They maintain that plaintiffs' cause of action is a simple breach of contract case and that, as such, it must be brought in the Court of Claims.

Whether an action is in fact one against the state and hence one that must be brought in the Court of Claims depends not on the formal identification of the parties, but rather on the issues involved and the relief sought. *Healy v. Vaupel*, 133 Ill.2d 295, 308, 140 Ill.Dec. 368, 549 N.E.2d 1240 (1990). The prohibition " 'against making the State of Illinois a party to a suit cannot be evaded by making an action nominally one against the servants or agents of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested.'" *Healy*, 133 Ill.2d at 308, 140 Ill.Dec. 368, 549 N.E.2d 1240, quoting *Sass v. Kramer*, 72 Ill.2d 485, 491, 21 Ill.Dec. 528, 381

N.E.2d 975 (1978). The doctrine of sovereign immunity "affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court." *Healy*, 133 Ill.2d at 308, 140 Ill.Dec. 368, 549 N.E.2d 1240 (and cases cited therein). The doctrine serves to "protect[] the State from interference in its performance of the functions of government and preserve [] its control over State coffers." *S.J. Groves & Sons Co. v. State*, 93 Ill.2d 397, 401, 67 Ill.Dec. 92, 444 N.E.2d 131 (1982).

The court holds that the officer suit exception to the doctrine of sovereign immunity is inapplicable here. In doing so, the court notes that "the most that can be said with respect to the Treasurer's actions is that (1) she misread the terms of the Trust Agreement as requiring the Governor's consent for an amendment to that agreement when such consent was not, in fact, required and (2) she incorrectly believed that the settlement provisions contained in the buy-sell agreements were material covenants to those agreements, when, in fact, the provisions were rendered irrelevant by the settlement of the reliance letter litigation in October 1995." 216 Ill.2d at 267, 296 Ill.Dec. at 837-38, 836 N.E.2d at 360-61. The court then concludes that these errors are "errors of contract and trust interpretation" and are not unconstitutional, *ultra vires* acts. I find this conclusion rather troubling under the facts of this case because this case concerns more than just mere questions of contract interpretation.

As an initial matter, my disagreement with my colleagues lies not in the recitation of facts, with which I agree, but

rather in the interpretation of those facts. Similar to the lower courts, I am troubled by the way in which the Attorney General left the Treasurer with little choice but to follow his opinion even though the Treasurer did not agree with it. In this case, we have a very public disagreement between the Attorney General and the Treasurer as to what steps to take to protect the state's interest in the Trust Agreement. It is clear from the record that the Treasurer was represented by counsel when she entered into the agreements with plaintiffs. The record is also clear that the Treasurer *did not seek* the Attorney General's input into the matter. Had the Treasurer wanted the Attorney General's opinion, it stands to reason that she would have sought it *prior* to signing the agreements in the first place. The record indicates clearly that the Attorney General, on his own initiative, only entered into the fray after news accounts started to be published about the impending transaction. Indeed, the Attorney General's public posturing in this case at the time in question smacks more of sound-bite politics than of true legal or even financial acumen. As I shall explain, our state constitution does not give the Attorney General authority over the Treasurer in the manner that was exercised in this case. Nor does the Trust Agreement give the Attorney General the duties of oversight that the Attorney General willed unto himself. I believe that these concerns are what caused the lower courts that have addressed this issue to rule that sovereign immunity does not lie under these facts. The record makes clear that once the Attorney General entered into the matter, the Treasurer, for all and intents and purposes "opted out," despite her conviction that the deal she brokered was in the best financial interests of the state. The record establishes that the Treasurer did not act in June because she was going to let the Attorney General make the

ultimate decision on her right to close. It is clear from reviewing the contemporaneous statements regarding the transaction that are contained in the record that the Treasurer was ready and willing to execute the buy-sell agreements, which she believed to be in the best financial interests of the state, until the Attorney General intervened. As noted previously, plaintiffs were informed in early *365 May 1995, that the *ultimate decision* regarding the sale would be made by the Attorney General. And it is here where I part company with my colleagues because I do not believe that it is proper to use the doctrine of sovereign immunity under these circumstances. The Treasurer violated her constitutional obligation by allowing the Attorney General to make the *ultimate decision* regarding whether the sale would be made.

As I noted, the Trust Agreement does not charge the Attorney General with any oversight responsibilities. The Trust Agreement names the Treasurer as the constitutional officer charged with such duties. The record affirmatively demonstrates that, despite having this authority, it was the Attorney General who announced that he would not "approve" the agreements. Meanwhile, the Treasurer allowed the closing date to pass while she awaited the final word regarding its merits, both financial and legal, from the Attorney General. Thus, for all intents and purposes, it was the Attorney General who took charge of the oversight of the Trust Agreement. The Attorney General's review was not completed until July 10, 1995, and it was at that time that he publicly announced that the Treasurer did not have the authority to make the transaction and that her doing so was in excess of any of her statutory or constitutional duties. The Attorney General's July 11, 1995, letter to plaintiffs, in which

he requested the books and expense records of both hotels, indicates to me, at least, that the Attorney General was taking over a greater role in the handling of the Trust Agreement.

In light of the above, the Attorney General killed the deal on the basis of his legal conclusion that the buy-sell agreements were invalid and his conclusion that the agreements were fiscally inadvisable for the state. These facts are recounted in the news accounts that were made a part of the record, which reveal that the Attorney General on the day that he announced that the deal was "dead" was quoted as saying, "After a careful, comprehensive review by both my staff and the U of I team, I conclude that it is not in the state's best interest * * * to settle. It's a bad deal for the state." Defendants' Appendix, at A-123. The Attorney General also took the position that any loan arrangement made by the Treasurer would need *his* approval.[4] Contrariwise, at a separate news conference held on the same day, the Treasurer was quoted as saying that she told the Attorney General that she "could not accept the numbers" and insisted that the deal she struck was financially the most lucrative the state could hope for. Defendants' Appendix, at A-121. Clearly, the record establishes that the Attorney General would not *allow* the Treasurer to proceed with this transaction. Stated simply, the situation we have at bar has

4. It is important to note that nowhere in the statutory program which spawned the Trust Agreement is authority to approve loan arrangements given to the Attorney General. Nor does the statute provide the Attorney General with fiscal oversight with respect to the best interests of the state. Rather, under the statutory framework of the Mortgage Program, the Treasurer was charged with these responsibilities.

two constitutional officers at loggerheads over who has the authority to do what. The Attorney General placed the Treasurer in a situation where she was forced to choose between doing her job, *i.e.*, exercising her judgment on financial matters with respect to the Trust, or following the unsought advice of a fellow state officer. The court states that the Treasurer's actions must be construed as voluntary because the Attorney General's advice was not legally binding and that she was free to disregard it. I disagree because the tone and tenor of the contemporaneous comments suggest otherwise. The Attorney General repeatedly stated publicly that the deal would not go through without *his* approval. Indeed, letters contained in the record indicate that it was the Attorney General, not the Treasurer, who would examine "the books and expense records" with respect to any analysis of the agreement in question or any future proposal. It would seem that this type of conflict would fall within the officer suit exception to the doctrine at least with respect to the circumstances here.

On the day that the Attorney General stated his opinion and announced that the deal was dead, the Treasurer publicly characterized the opinion as "illogical" and "unrealistic" and likened the Attorney General's actions to "reversing the outcome of the Super Bowl on the basis of armchair speculation from Monday morning quarterbacks." The Treasurer further stated that the agreements were valid, yet still inexplicably followed the Attorney General's opinion. The Treasurer's colorful sporting analogy reveals that the Treasurer did in fact delegate her duties to the Attorney General. The only way a Monday morning quarterback can control the outcome of the Super Bowl is if the officials

whose job it is to rule on calls allow themselves to be reversed by others. The Treasurer, whose job it was to "make the call" in this case allowed herself to be reversed by an official who had no legal or constitutional right to "make the call." This demonstrates the type of constitutional derogation of duty that both the lower courts in this case were troubled by and why they ruled that the doctrine of sovereign immunity did not apply to this case. The court today chooses to characterize the Treasurer's actions as purely voluntary, but I do not. In my view, the Treasurer, at the time all of these events occurred, took a "my hands are tied" approach to the Attorney General's intervention. The plaintiffs allege that by taking such approach, the Treasurer delegated her constitutional duties in such a way as to render inapplicable the doctrine of sovereign immunity. I agree. The record indicates that the Treasurer believed the agreements were valid and the Attorney General was wrong on a financial level. The Treasurer was constitutionally and statutorily obligated to protect the state's assets and follow through on her contractual obligations.

In her brief, the Treasurer claims that her actions in failing to perform the contract cannot be equated with her violating any constitutional or statutory duty. I believe her argument, however, oversimplifies matters to an extent—the Treasurer failed to perform the contract because the Attorney General would not let her proceed and she did nothing to prevent him from doing so. This raises the troubling specter of our Attorneys General having the power to invalidate every contract entered into by state officials at his or her whim. It is also suggests that the Attorney General has the power to "go over the head" of the Treasurer in matters

related to the duties of her office. Such a holding would appear to be at odds with our case law in this area.

Under our current state constitution, the Treasurer "in accordance with law, shall be responsible for the safekeeping and investment of monies and securities deposited with him." Ill. Const. 1970, art. V, § 18. Although our Constitution does not provide a precise explanation of the Treasurer's duties, this court has noted that

> "[i]n the absence of a constitutional definition of his powers and duties the primal functions of a treasurer are necessarily implied. He is required to perform the duty of receiving and safely keeping the public funds which are entrusted to him, even in the absence of a statute. The very name given to his office denotes his obligation in this regard and the constitution implies it. Both the power and the duty of receiving and safely keeping the public funds entrusted to him are within the purview of the powers and duties which are inherent in his office and in no way depend upon the authority of the General Assembly. He can neither be deprived of the power nor relieved of the duty." *People ex rel. Nelson v. West Englewood Trust & Savings Bank*, 353 Ill. 451, 465, 187 N.E. 525 (1933).

Moreover, the Treasurer, under the terms of the Trust Agreement, was made the state officer responsible for directing the trust activities, a trust which was funded with state monies.

Here, it is clear that the Treasurer believed that she had the authority to enter into the agreements and, until the time the Attorney General intervened, was prepared to close on the deal because she believed that it represented the best financial deal the state could get. These actions are consistent with her authority under the Trust Agreement and under her general duties as Treasurer. The Attorney General then stepped into the matter and asserted both his legal and financial opinions over it. I believe that once the Treasurer signed the agreements with plaintiffs, it was too late for the Attorney General to offer his opinion as to the validity of the agreements. Had the Attorney General had doubts about the legality of the Treasurer's actions, the better approach would have been for him to have initiated, as the state's chief legal officer, some type of injunctive action to preclude the sale in which a *judicial determination* regarding how many of this state's constitutional officers were needed to authorize these agreements could be made. In fact, the Attorney General's office's "Guidelines" suggest that this is the proper course of action to take in such instances. See appendix ("Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, Adopted March 29, 1962").[5]

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5. The Guidelines give four examples of situations in which no opinion will be issued. At least three of the four situations indicated in the guidelines are arguably at play in this case, including (i) opinions will not be furnished regarding the exercise of executive judgment, (ii) opinions should not be requested unless a *bona fide* need exists by the party requesting it with respect to the performance of his or her official duties, and (iii) opinions should not be furnished in cases of difficult or important questions of law and resort should be made to a declaratory judgment action. See appendix ("Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, Adopted March 29, 1962").

Appendix A

The legal questions regarding the authority to enter into the agreements are, at the end of the day, questions that can only be resolved with definitiveness by the judicial branch. Attorney General opinions are advisory in nature and are not binding upon the state or the courts. *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994); W. Scott, *The Role of Attorney General's Opinions in Illinois*, 67 N.W. L.Rev. 643 (1972). Thus, we do not know whether the Attorney General's opinion is correct—the analysis used in today's opinion is such that judiciary need never determine whether that opinion withstands scrutiny. See 216 Ill.2d at 266-67, 296 Ill.Dec. at 837-38, 836 N.E.2d at 360-61 (expressing "no opinion" as the correctness of the Attorney General's opinion). Unfortunately, the court's treatment of this issue prevents our courts from addressing any of these important matters.

The primary case upon which the court relies, *Smith v. Jones*, 113 Ill.2d 126, 100 Ill.Dec. 560, 497 N.E.2d 738 (1986), can be distinguished in that the plaintiffs there did not allege a violation of the law. Indeed, the complaint itself recognized that the state official's actions in question were done "pursuant to the *letter* of the [Lottery] Act and the rules and regulations thereunder." (Emphasis in original.) *Smith*, 113 Ill.2d at 132, 100 Ill.Dec. 560, 497 N.E.2d 738. The court in *Smith* stressed that the allegations of the complaint were only that the official exceeded his authority by breaching the contract. In contrast, the allegations here are that the Treasurer abdicated her authority to the Attorney General. Plaintiffs argue that the contract was breached, not because the Treasurer was following the letter of the law, but was allowing, contrary to the constitution and her duty under the

Mortgage Program, another state official to make calls that she alone had the authority and the discretion to make. Whereas what was involved in *Smith* was, in the court's words, "simply a drawing in which the amount of prize money due the plaintiffs is in dispute" (*Smith*, 113 Ill.2d at 133, 100 Ill.Dec. 560, 497 N.E.2d 738), what is involved here is whether it is proper for a constitutional officer to pass her duties on to another constitutional officer.

As noted previously, one of the purposes of sovereign immunity is to preserve the state's coffers. Ironically, the court's decision to invoke the doctrine here does more to harm those coffers than to protect them. The record is replete with references to the financial cost to the state in maintaining the initial loans. The agreement reached by the Treasurer and the plaintiffs had many benefits—the first of which was that state would no longer be liable for the hotel properties, which had the potential to end up in foreclosure. The state was also to receive more money than was previously offered by other potential buyers. The record contains no mention of the current financial status of the loans, and the parties have not apprised us of any change to that status. As a result, there is no reason for this court to ignore the record evidence in this case, namely, that the agreements reached by the Treasurer had many financial benefits for the state. Based on the facts as they are currently before us, it is my belief that the application of sovereign immunity to this case frustrates, rather than serves, the goal behind the doctrine.

In my view, the court's opinion simply concludes that any errors made by the Treasurer in this case constitute errors of contract law. I believe this approach fails to address the

crux of plaintiffs' arguments. The question is not whether the Treasurer made a mistake in interpreting a contract or a trust agreement. Rather, the question is whether the Treasurer abdicated her duty by allowing her actions to be dictated by the Attorney General knowing that the financial interests of the state were better served by closing on the agreements. The court states that the Treasurer "should not be placed in the position of having to refuse to hear legal advice in order to avoid violating the constitution." 216 Ill.2d at 266, 296 Ill.Dec. at 837, 836 N.E.2d at 360. I am not advocating putting the Treasurer in the position of "refusing to hear legal advice." The Treasurer in this case did not have to "refuse to hear" the Attorney General's advice, but she did have an obligation to refuse to *follow* that advice when she believed that the advice was not in the best interests of the state. The record makes clear that the Treasurer publicly and openly disagreed with the Attorney General on every level—she believed that her agreements with plaintiffs were valid and that the deal was in the financial interests of the state. When such conflicts arise amongst constitutional officers, the solution is not for one to "back down" to the other as the court seemingly suggests today. I am concerned about this because I believe this case, at root, represents the ability of our citizens to trust and have faith in the actions of our public officials. They need to trust, for example, when dealing with a state treasurer in negotiations such as these, that another constitutional officer will not be able to "kill" the deal with such unfettered power. Today's opinion certainly does not allay fears that dealings with state officials are not fair and evenhanded.

I also find another aspect of the court's opinion troubling. The court notes that the proper tribunal for the adjudication

of this claim is the Court of Claims. Plaintiffs here, however, are seeking specific performance. During oral argument, the parties were asked whether the Court of Claims can provide the remedy of specific performance. It would appear from the conclusion reached by this court that the implicit answer to that question is yes. The Court of Claims, however, has persistently recognized that it cannot grant equitable relief (see *Garimella v. Board of Trustees of the University of Illinois*, 50 Ill. Ct. Cl. 350 (1996) (and cases cited therein)) despite pronunciations by this court and our appellate court which would appear to take a contrary view. See *Ellis v. Board of Governors of State Colleges & Universities*, 102 Ill.2d 387, 80 Ill.Dec. 750, 466 N.E.2d 202 (1984); *Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University*, 248 Ill.App.3d 599, 188 Ill.Dec. 124, 618 N.E.2d 694 (1993); *Brucato v. Edgar*, 128 Ill.App.3d 260, 83 Ill.Dec. 489, 470 N.E.2d 615 (1984). Given the differing opinions that exist on this issue and the fact that questions were raised at oral argument with respect to it, I would order additional briefing on the matter so that our opinion in this case would speak clearly on this important issue.

In light of the above, I am unable to join in my colleagues' opinion and respectfully dissent.

Appendix A

APPENDIX

(SEAL)

STATEMENT OF POLICY OF THE ATTORNEY GENERAL RELATING TO FURNISHING WRITTEN OPINIONS

Adopted March 29, 1962

The Attorney General of the State of Illinois makes the following statement of policy relating to the constitutional and statutory duty to give written opinions.

A. Persons to Whom Opinions Will Be Issued

1. The Attorney General will furnish written opinions as required by law to the Governor and other elected and appointed State officers upon legal or constitutional questions relating to the duties of those officers, respectively.

2. The Attorney General will furnish written opinions to the officers of either branch of the General Assembly and chairpersons and minority spokespersons of committees thereof on matters that relate to their duties as such.

3. The Attorney General will consult with and advise the several State's Attorneys in matters relating to the duties of their offices and will furnish written opinions to State's Attorneys in matters relating to their official duties, when appropriate.

4. The Attorney General is not authorized to furnish written opinions to the officers of, or attorneys for, public corporations, municipal corporations, townships or other policital subdivisions of the State, in the absence of specific statutory authority providing therefor.

5. The Attorney General is not authorized to furnish opinions to private persons or entities.

B. Form in Which Opinion Requests Should Be Made

1. Requests must be in the form of a letter and addressed to the Attorney General, attention Opinions Bureau, 500 South Second Street, Springfield, Illinois 62706.

2. All requests must contain a clear, concise question of law and a complete statement of the facts describing the situation out of which the legal issue arises. The Attorney General will not seek out the facts or infer the question from enclosed correspondence. All requests should name a person whom the staff of the Attorney General may contact to discuss the request.

3. Requests made by executive officers, by chairpersons, directors, heads or executive secretaries of boards, commissions, departments and agencies of the State, by officers of the General

Assembly and its committees and commissions and by State's Attorneys must be signed or endorsed by such officers.

4. Requests from officers under the jurisdiction of the Governor must also be forwarded through his office, in accordance with his policy.

C. Situations in Which No Opinion Will Be Issued

1. The Attorney General will not furnish opinions regarding the exercise of executive judgment or discretion, nor on questions of fact.

2. The Attorney General will not furnish opinions on questions scheduled for determination by the courts.

3. No opinion should be requested unless a *bona fide* need exists by the party requesting it with respect to the performance of his or her official duties.

4. For a particularly difficult and important question of law, officials should resort to a declaratory judgment action whenever practicable, and the Attorney General may recommend this or other courses of action that may be more appropriate than the issuance of an opinion.

Appendix A

D. Miscellaneous Provisions

1. Officers requesting opinions and interested private parties or other governmental agencies may submit memoranda of law and policy and other statements and material for the consideration by the Attorney General. Such material should be submitted to the attention of the Opinions Bureau in the Springfield office of the Attorney General.

2. All official opinions of the Attorney General are signed by the Attorney General. Informal opinions and other letters signed by Assistant Attorneys General are not official opinions.

3. All opinions are on file in the Attorney General's office in Springfield.

4. These guidelines do not apply to the furnishing of interpretive opinions by the Attorney General as administrator of the Franchise Disclosure Act of 1987 (815 ILCS 701/1 *et seq.*)

5. In order for the Attorney General to act in the best interests of the public and the State, all guidelines are subject to exception where special circumstances can be shown to warrant an exception.

Please note that it is very helpful for the Attorney General to be apprised of all background information relating to an opinion request. Further, any information relating to the *practical effect* of any particular resolution of a question posed should be included with a request for an opinion.

APPENDIX B — RULE 23 ORDER OF THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT FILED APRIL 15, 2003

NO. 5-00-0206
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PHL, INC., and
THE PRESIDENT LINCOLN HOTEL CORPORATION,

Plaintiffs-Appellees,

v.

PULLMAN BANK AND TRUST COMPANY, Trustee Under Illinois Insured Mortgage Pilot Program Dated July 14, 1982, and JUDY BAAR TOPINKA, Treasurer of the State of Illinois,

Defendants-Appellants.

RULE 23 ORDER

The plaintiffs, PHL, Inc., and the President Lincoln Hotel Corp., brought this contract action against the defendants, Pullman Bank and Trust Company (Pullman), trustee, and Judy Baar Topinka, Illinois State Treasurer (Treasurer). In their complaint, the plaintiffs sought the enforcement of certain buy-sell agreements (Agreements), mandatory injunctions to enforce the Agreements against both Pullman and the Treasurer, and a writ of *mandamus* to compel the

Treasurer "to perform her constitutional duties, which includes [*sic*] the performance of the State's obligations contained in the *** Agreements."

On March 13, 2000, the trial court entered an order granting the plaintiffs specific performance of the Agreements as modified by the court. The appeal raises the following issues: (1) whether the Treasurer exceeded her authority when she entered into the Agreements and (2) whether the trial court was correct in ruling that the plaintiffs were ready, willing, and able to complete the purchase of the loans as set forth in the Agreements. We affirm.

BACKGROUND

This case arises out of the Illinois Insured Mortgage Pilot Program (Program). The Program was established in 1982 with the purported purpose of stimulating Illinois's economy. The Program was implemented by the establishment of a trust into which the state invested funds that, in turn, were loaned by the trust to commercial enterprises. The state owns the trust estate, and the Treasurer oversees the Program for the state.

Loans under the Program were made to the President Lincoln Hotel Venture and the Collinsville Hotel Venture (Borrowers) in order to finance the construction of hotels in Springfield and Collinsville. After the loans were restructured, the matter became one of litigation in Cook County. A more detailed statement of the facts of the Cook County litigation and the operation of the Program is

presented in the First District's opinion in the litigation. *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048, 649 N.E.2d 432 (1994). A cursory statement on the Cook County litigation is essential to understanding this appeal. Bank One, as trustee and at the direction of the Treasurer, had declined to accept reliance letters that had been submitted by an accountant on behalf of the Borrowers. (Pullman has succeeded Bank One as trustee.) The restructured mortgage agreement required reliance letters to be submitted and accepted. Claiming that the Borrowers had failed to provide adequate reliance letters, Bank One and the Treasurer gave notice of their intent to declare the loans in default.

In 1992, the Borrowers filed a complaint in the circuit court of Cook County, seeking to stop the Treasurer and the trustee from declaring the loans in default. The Borrowers claimed that the refusal to accept the reliance letters was a part of a scheme by the Treasurer to have the loans found in default. The Borrowers pointed to public statements made by the Treasurer that the loans were "bad loans."

Upon a motion by the Treasurer, the trial court dismissed the complaint as barred by sovereign immunity. The Illinois Appellate Court, First District, upheld the dismissal. *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048, 649 N.E.2d 432 (1995). The Borrowers filed a petition for rehearing, which was denied on May 5, 1995. The Borrowers then filed a petition for leave to appeal with Illinois Supreme Court, which was withdrawn on October 4, 1995 (*President Lincoln Hotel Venture v. Pullman Bank & Trust Co.*, 163 Ill. 2d 586, 657 N.E.2d 637 (1995)), and the Cook County litigation was settled.

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In 1995, two corporations, PHL, Inc., and the President Lincoln Hotel Corp., offered to buy the entire bundle of rights held by the Program in regard to the hotels. Plaintiff President Lincoln Hotel Corp. has a business relationship with borrower President Lincoln Hotel Venture and offered to buy the portion of the Program's rights relating to that hotel. Plaintiff PHL, Inc., has a business relationship with the Collinsville Hotel Venture and offered to buy the portion of the Program's rights regarding that hotel.

On April 19, 1995, the trustee, pursuant to authorization from the Treasurer, entered into the Agreements with the plaintiffs, and the Treasurer signed off on joinders evidencing her agreement to execute the Agreements. The Agreements covered the mortgage loans, additional collateral (such as letters of credit), and the settlement of all the litigation concerning the mortgages. Under the Agreements, the plaintiffs agreed to buy the loans for $10 million: $3.7 million for the loan relating to the Springfield hotel and $6.3 million for the loan relating to the Collinsville hotel. Both Agreements stated: "As part of [the] purchase and sale transaction, Borrower, the State[,] and Trustee have agreed to resolve and settle all matters and controversies among them, including the [Cook County] Litigation." The Agreements set a closing date of June 30, 1995.

After the execution of the Agreements, the Illinois Attorney General announced his intention to review the proposed sale of the loans and indicated that the closings should not take place until his review was completed. On July 10, 1995, the Attorney General issued an opinion letter stating that the Agreements were unenforceable.

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In December 1995, the plaintiffs filed this action asking the circuit court to enforce the Agreements, either by the entry of a mandatory injunction or by a writ of *mandamus*.

On July 28, 1998, this court entered an order regarding a denial of the plaintiffs' request for a preliminary injunction. *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064 (1998) (unpublished order under Supreme Court Rule 23 (166 Ill. 2d R. 23)). Many of the facts necessary for a better understanding of the instant appeal are described in our previous order, a copy of which is attached as an appendix hereto. In the former appeal, we held that the trial court had jurisdiction to consider the issues raised and that the trial court abused its discretion when it denied the plaintiffs' motion for a preliminary injunction. We remanded the case to the circuit court.

TRIAL COURT PROCEEDINGS AFTER REMAND

After our remand, Pullman moved for a summary judgment, arguing that the Agreements were not enforceable because they lacked the consent of the Illinois Attorney General. The Treasurer filed a similar motion for a summary judgment, alleging that the Agreements were unenforceable due to the Attorney General's conclusion that the Illinois Governor had to concur in the Agreements but that he had not done so. The plaintiffs filed a cross-motion for a partial summary judgment. On April 7, 1998, the trial court granted the plaintiffs' motion, finding that the Treasurer had the authority, without approval from either the Attorney General or the Governor, to enter into the Agreements.

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In May 1998 the plaintiffs filed a motion for a summary judgment, arguing that they were ready, willing, and able to fulfill their obligations under the Agreements. The parties attempted to conduct discovery but were bogged down at length with motions directed at the discovery process. While discovery and discovery motions were pending, the plaintiffs filed a second emergency motion for a temporary restraining order (TRO), seeking to bar the defendants from declaring the loans, which were the essence of the Agreements, in default for the plaintiffs' failure to reduce the outstanding principal amount of the loans. The trial court granted the plaintiffs' *ex parte* motion for a TRO.

On October 20, 1999, the plaintiffs filed their third and final motion for a summary judgment. In this motion, the plaintiffs claimed that the only remaining issue for the court to decide concerned the "plaintiffs' duty to show their ability, willingness, and readiness to have complied with the purchase due under the Buy/Sell Agreement related to said properties by June 30, 1995." The plaintiffs attached affidavits of various investors willing to provide funds to allow the plaintiffs to fulfill their obligations under the Agreements. The plaintiffs alleged that the affidavits showed that they were ready, willing, and able to fulfill their obligations under the Agreements and that the court should grant a summary judgment in their favor.

On December 2, 1999, the trial court entered an order denying all of the defendants' discovery motions and granting the plaintiffs' motion for a summary judgment. The court additionally ordered the plaintiffs to prepare a final order that would set forth the terms of the specific performance required of all parties to the Agreements.

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On March 13, 2000, the trial court entered the order that is the subject of the instant appeal. With no further questions remaining, the court found that the plaintiffs had performed all necessary acts to sustain their right to the specific performance of the Agreements as modified by the trial judge. The trial court's order requires the parties to specifically perform their respective obligations under the modified Agreements. The court stated that the order was final and that there was no just reason to delay enforcement or appeal.

ANALYSIS

The defendants assert that the doctrine of sovereign immunity bars the plaintiffs' action. The defendants contend that the matter should be submitted to the court of claims. In our previous decision in this case, we ruled that the plaintiffs' action was not a present claim and that, in any event, the action fell under an exception to the doctrine of sovereign immunity. *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064 (1998) (unpublished order under Rule 23).

We see no reason to disturb our previous ruling. The parties previously addressed the issue of sovereign immunity in their briefs on appeal to this court, and a ruling was made informing the parties that the circuit court was the proper forum for the dispute. Thus, our prior ruling is the law of the case. See *Bilut v. Northwestern University*, 296 Ill. App. 3d 42, 47, 692 N.E.2d 1327, 1331 (1998); *Sanders v. Shepard*, 258 Ill. App. 3d 626, 633, 630 N.E.2d 1010, 1016 (1994), *aff'd*, 163 Ill. 2d 534, 645 N.E.2d 900 (1994). Nonetheless, the issues raised on appeal make evident that our prior ruling is correct.

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After entering into the Agreements, the Treasurer declined to act, based upon the advice of the Attorney General contained in an opinion letter (1995 Ill. Att'y Gen. Op. __, No. 95-003). In the opinion letter, the Attorney General advised that the Treasurer did not have the authority to enter into the Agreements without the consent of the Governor. The advice given in the opinion letter is incorrect.

In the opinion letter, the Attorney General begins by discussing the history of the Program. The Attorney General discussed how the original investments in the Program were made under section 22.5 of the Deposit of State Moneys Act (Act) (15 ILCS 520/22.5 (West 1994)). This section had been amended effective in 1982 to require the Governor's signature to invest, or reinvest, any money in the Treasury for the Program. Pub. Act 82-785, eff. July 13, 1982. The 1982 amendment added two paragraphs to section 22.5; here is the first:

> "The State Treasurer may, with the approval of the Governor, invest or reinvest any State money in the Treasury which is not needed for current expenditure due or about to become due, or any money in the State Treasury which has been set aside and held for the payment of the principal of and the interest on any State bonds, in investment certificates and other forms of investment securities of banks incorporated under the laws of this State or any other state or under the laws of the United States; provided, however, that investments may be made only in those banks which are insured by the Federal Deposit

Insurance Corporation." Ill. Rev. Stat. 1983, ch. 130, par. 41a.

The Attorney General stated that this required the Governor to approve the Agreements. The opinion letter reads:

> "The General Assembly added this language to section 22.5 for the purpose of facilitating *the creation* of the construction loan program which would eventually become known as the Illinois Insured Mortgage Pilot Program. *** By conditioning the Treasurer's authority to invest in certificates of this sort upon the consent of the Governor, the General Assembly clearly recognized and accepted the role to be played by the Governor in *creating and administering* the Program.
>
> Although section 22.5 was amended by Public Act 87-331, effective January 1, 1992, to delete these two paragraphs, the amendment had no impact on the existing program and investments." (Emphasis added.) 1995 Ill. Att'y Gen. Op. __, No. 95-003, at 3-4.

The Attorney General opinion letter fails on its face to provide support for the conclusion it reaches. The Attorney General jumps from the necessary consent of the Governor in creating the Program, evident from the plain language of the Act and the legislative history cited in the letter, to a conclusion that the Governor's consent is necessary for the continuing

administration of the Program. There is no basis for this extrapolation.

An extension of the Governor's role from a signatory to the direction of the investments in the Program to an additional role in determining the sale of the loans is also contrary to the way the Program operated. The Program was operated by private banks under the oversight of the Treasurer. The Treasurer was solely responsible for state oversight of the operations once the investment was made. This went so far as to give the Treasurer the power to determine the extent of the oversight. For instance, in 1991, the Treasurer authorized a supplemental agreement that permitted closer monitoring by the certificateholders. The Treasurer acknowledged and consented to the supplemental agreement on behalf of the state, and the Governor's signature was not needed. The Treasurer's role under the Program is consistent with other powers granted by the Act and the constitutional responsibility in "safekeeping and investment of monies and securities deposited with him." Ill. Const. 1970, art. V, § 18. The Treasurer's role as safekeeper underlies her duty to fulfill the Agreements she entered into.

The Attorney General's statement that the deletion of the 1982 amendment in 1992 "had no impact on the existing program and investments" belies the conclusion that gubernatorial consent was necessary for the Agreements. The amendment, by deletion, obviously did not affect the existing program, as conceded by the defendants. The reason this deletion did not affect the existing program and investments was that the Governor's consent was only necessary at the inception for the investment, or reinvestment, that created

the Program and it was not necessary for subsequent actions, such as the divestment which is at issue in the case at hand.

The defendants' focus on appeal is not on the power of the Governor, but on the need for consent from the Attorney General. The defendants argue that the Attorney General's approval of the Agreements was necessary to render them binding and enforceable. The defendants contend that the Agreements infringed on the Attorney General's power to control the state's legal business. See *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority*, 98 Ill. 2d 58, 66, 456 N.E.2d 50, 55 (1983) (contract case concerning the powers of Attorney General that was resolved in circuit courts). The infringement, as argued by the defendants, derives not from any need to follow the Attorney General's advice in his opinion letter, but from the need of the Attorney General to control the Cook County litigation. According to the defendants, the settlement of the Cook County litigation was a prerequisite of the Agreements. The Agreements did call for the parties to resolve the litigation. At the time of the execution of the Agreements in April 1995, a petition for leave to appeal was on file with the Illinois Supreme Court.

The plaintiffs point out, however, that a settlement of the Cook County litigation at that time is not essential to the present enforcement of the Agreements. The Cook County litigation did not involve a sale of the loans, and the plaintiffs in that case were not asking as relief for the loans to be purchased. In fact, the Cook County litigation was resolved when the petition for leave to appeal was denied in October 1995. As the trial court in our case ruled on the defendants' motion to transfer venue in May 1996: "This Court finds

that the settlement agreement which has the forum selection provision for Cook County is an unrelated matter to the issues presiding before this Court; that the issues in the settlement agreement have been settled and disposed of and have no further bearing in this case. This Court finds that the Buy-Sell Agreement can be enforced without reference to that settlement agreement which has been settled."

The weakness of the defendants' claim that the Agreements are an infringement on the Attorney General's power to conduct litigation is revealed by looking at the Attorney General's opinion letter. The purported reason for advising that the executed agreements should not be fulfilled is not the same as that given in this appeal. The Attorney General's reason for objecting to the sale in July 1995 was not based on a perceived infringement on his power to conduct litigation, but on an inherently flawed argument that attempted to place responsibility upon the Governor to approve the sale.

A closer look at the Cook County litigation reveals why the trial court ruling in the case at hand is correct. The Borrowers in this case were the plaintiffs in the Cook County litigation. The suit stemmed from former Treasurer Patrick Quinn's exercise of his discretion to reject reliance letters, which, in essence, allowed him to find the loans in default. Unlike here, the court found, as a matter of fact, that there was no issue regarding the Treasurer's relationship to the Attorney General, and no such claim was made by the Treasurer. The reasoning and language used by the court in its decision illustrates why sovereign immunity does not apply to the case at hand and also gives insight to the Treasurer's responsibilities in the Program.

Appendix B

In the Cook County litigation, the Borrowers argued that the Treasurer's actions contradicted an opinion of the Attorney General and that, therefore, sovereign immunity did not apply. The court rejected this argument on factual grounds, stating:

> "First, this argument necessarily assumes that Attorney General opinions are legal authority. They are not. Even if a declaration of default would be in contravention of the Attorney General opinion, Treasurer Quinn would not be violating any State law; he would merely be going against the advise [*sic*] of his attorney.
>
> Moreover, Treasurer Quinn's actions do not conflict with the Attorney General's opinion. In November 1991, the Attorney General issued an opinion in which he concluded that neither an insufficiency of consideration nor the lack of the contract's approval by the Attorney General rendered the second restructuring agreements invalid. Treasurer Quinn is not now claiming that the contracts lacked consideration or are invalid because the Attorney General did not give his prior approval." *President Lincoln Hotel Venture*, 271 Ill. App. 3d at 1055-56, 649 N.E.2d at 438.

The court's statement is instructive in our case in two respects. First, it supports our conclusion that the Treasurer had no obligation to not fulfill the contract based on the opinion of the Attorney General. Second, it notes a distinction to explain why this case is not barred by the doctrine of

sovereign immunity. *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064 (1998) (unpublished order under Rule 23) (establishing as law of the case that sovereign immunity does not apply). In the Cook County litigation, the Treasurer was not questioning his authority or backing out of an obligation based on an opinion of the Attorney General. In this case, the Treasurer is. An exception to sovereign immunity applies because the defendants did exactly what the court found had not happened in the Cook County litigation–the Treasurer raised a constitutional issue by not fulfilling an agreement executed by the Treasurer based on a questionable relegation of its constitutional and statutory authority to the Attorney General. See *CGE Ford Heights, L.L.C. v. Miller*, 306 Ill. App. 3d 431, 437, 714 N.E.2d 35, 40 (1999); *Healy v. Vaupel*, 133 Ill. 2d 295, 308, 549 N.E.2d 1240, 1247 (1990) (there is no sovereign immunity when at issue is whether a state agent acted in violation of constitutional or statutory law or in excess of his or her authority).

The *President Lincoln Hotel Venture* court proceeded to discuss how the mere wording of the plaintiffs' complaint did not dictate whether sovereign immunity applied. In doing so, the court again informed us of the power and responsibilities of the Treasurer under the Program:

> "Plaintiffs concede that Treasurer Quinn has been granted full authority by the State to direct the activities of Bank One in relation to the trust estate. Thus, it is clearly within Treasurer Quinn's granted authority to direct Bank One to declare a default even if his actions may ultimately be found to be in violation of the second restructuring

> agreement. *In light of the facts of this case*, were we to accept plaintiffs argument, then every time a State official signed a contract, any of his acts under the contract with which the other party disagreed would become enforceable in the circuit court under the theory that the official exceeded his authority or abused his discretion." (Emphasis added.) *President Lincoln Hotel Venture*, 271 III. App. 3d at 1057, 649 N.E.2d at 439.

This case, however, is not simply a disagreement between the parties on the terms of the agreement. In this case, the Treasurer excused her actions on a claim that she lacked authority to fulfill the executed agreement. The resolution of this case hinges on whether the Treasurer exceeded her constitutional and statutory powers in relation to the Governor and the Attorney General. This is a matter for the circuit court and not the court of claims.

Aside from the issues of agency powers that place this matter clearly outside the scope of sovereign immunity, this case raises the specter of another concern–the ability of parties entering into agreements with the state to trust that promises will be fulfilled. This issue is often placed in terms of whether a party is seeking to enforce a present claim or is seeking an equitable remedy. We need not delineate on the trial court's ruling that the relief was a matter of specific performance or on our ruling establishing that the plaintiffs did not present a present claim; however, we feel the need to point out that it is appropriate to seek injunctive relief to enforce a previous agreement by the state. See *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064 (1998)

(unpublished order under Rule 23). In our prior order establishing that sovereign immunity does not apply, we cited to *Vogt v. Bartelsmeyer*, 264 Ill. App. 3d 165, 636 N.E.2d 1185 (1994). In *Vogt*, the state failed to keep promises made to a landowner as part of a settlement to obtain property that had been sought under eminent domain. As in this case, the credibility of the state to keep its promises was at issue. The *Vogt* court concluded: "Petitioners reached a good-faith settlement with our State to resolve the underlying eminent domain proceeding. Petitioners fulfilled their obligations and trusted the State to fulfill its obligations. After refusing to do so, the State aggressively attempted to evade compliance with its obligations both in the circuit court and [in] this court. The citizens of our [s]tate deserve better treatment from our government." *Vogt*, 264 111. App. 3d at 174, 636 N.E.2d at 1191.

The defendants also raise several issues regarding the trial court's conclusion that the plaintiffs were ready, willing, and able to complete the purchase of the loans as set forth in the Agreements. We find that the trial court properly exercised its discretion and that the conclusion is supported by the record.

Defendant Pullman complains that the trial court abused its discretion in allowing the plaintiffs to amend their complaint. Pullman contends that the plaintiffs altered their factual theory and altered the nature and quality of the proof required to defend the suit when they amended their complaint, pursuant to a motion made July 30, 1999, to add the allegation that, regardless of whether the lenders were willing to make loans, the "plaintiffs were ready willing and

able to finalize the agreements." Pullman contends that the plaintiffs obfuscated the facts until such time as witnesses' memories had failed and relevant documents became less available, thus effectively reducing Pullman's ability to investigate the new allegations. The plaintiffs respond that allowing the amendment was within the discretion of the trial court and that the amendment did not prejudice the defendants.

The trial court has broad authority to allow the amendment of pleadings. 735 ILCS 5/2-616 (West 2000). An amendment should be allowed if it "furthers the ends of justice." *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 557, 727 N.E.2d 1052, 1055 (2000). The trial court acted within its authority. The amendment did not add any additional parties, counts, or theories of recovery to the complaint. The defendants were not prejudiced by the amendment because the amendment was not contradictory, but supplementary.

The defendants claim that the plaintiffs were not entitled to a summary judgment. The defendants assert that for more than three years of litigation, the plaintiffs' claim centered on their need to obtain financing in order to acquire the loans but then changed to assert that the plaintiffs personally could provide the cash necessary to complete the loans. The defendants cite to discovery, indicating that no commitment had been made by a financial institution, and they assert that this proof is the reason for the amended pleading. From this, the defendants assert that the plaintiffs had conceded that they were not personally able to provide the necessary cash and were, therefore, not ready, willing, and able to purchase the loans.

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The record supports the trial court's finding that the plaintiffs would have been ready, willing, and able to complete the purchase. The plaintiffs were not required to actually tender the purchase price, because the defendants had repudiated the deal. See *Lovins v. Kelley*, 19 Ill. 2d 25, 28, 166 N.E.2d 69, 71 (1960). In order to obtain specific performance, the plaintiffs were required to show that they would have completed the deal had the defendants not repudiated it. The plaintiffs met this burden. The affidavits presented by the plaintiffs indicated that they had the resources at their disposal to get the needed funds. Support of this claim through affidavits was appropriate because the issue was a matter of the resources of the plaintiffs and not a typical matter of damages contested in contract actions. The attacks made by Pullman on the affidavits do not alter the substance of the affidavits that support the conclusion that the plaintiffs had the resources to complete the deal. See 145 Ill. 2d R. 191.

The defendants did not present anything to counter the assertions that the plaintiffs had resources available. The original claim that financing would be available is not contradictory to an assertion that the plaintiffs would be able to make up any shortfall. That claim, therefore, was not a concession that the plaintiffs did not have the necessary resources available.

We also find that the trial court properly handled discovery in this case. The defendants contend that they were unfairly precluded from completing discovery relative to the plaintiffs' amended complaint. A claim that a party was unfairly precluded from completing discovery will be

reviewed under the abuse-of-discretion standard. *Blott v. Hanson*, 283 Ill. App. 3d 656, 661, 670 N.E.2d 345, 349 (1996). In this case, the defendants did not seek a continuance of the dispositive motion. Further, the plaintiffs point out that any delay was due in part to Illinois subpoenas being issued on out-of-state witnesses and a delay from the amendment of July 30, 1999, to November 2, 1999, for the first deposition notice. On the basis of the record before us, we cannot say that the trial court abused its discretion.

The defendants finally complain that the trial court order was both vague and incomplete. The defendants contend that the order is overbroad in that it incorporates the Agreements. The defendants point to section 11-101 of the Illinois Code of Civil Procedure, which addresses temporary restraining orders:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" 735 ILCS 5/11-101 (West 2000).

See *Howard Johnson & Co. v. Feinstein*, 241 Ill. App. 3d 828, 838, 609 N.E.2d 930, 936 (1993). A review of the order, however, indicates that the court ordered the specific performance that is required and, because the Agreements are being specifically enforced, a reference to the Agreements was necessitated by the order. There is no requirement that the order address every contingency of enforcement.

Nonetheless, the defendants point out that the order is incomplete because it fails to address the issue of any right to effectuate the collection of moneys due under the loans prior to the date the Agreements were to have closed and regarding payments due after this action was commenced. Thus, the cause is remanded to the trial court for a resolution of this question.

The order of the circuit court is hereby affirmed, and the cause is remanded with directions to proceed in a manner consistent with this order.

Affirmed; cause remanded with directions.

GOLDENHERSH, J., with MAAG, J., concurring.

HOPKINS, P.J., dissenting:

Under the State Lawsuit Immunity Act, the State of Illinois cannot be made a party to any lawsuit, except as provided in the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.* (West 2000)) or in the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 2000)). 745 ILCS 5/1 (West 2000). Under the Court of Claims Act, the court of claims has exclusive jurisdiction over "[a]ll claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b) (West 2000).

A three-part test is used to determine if a defendant is entitled to sovereign immunity, in which event the

controversy is justiciable only in the court of claims. "Sovereign immunity exists where (1) the defendant is an arm of the state, (2) the plaintiffs action constitutes a 'present claim' with the potential to subject the state to liability, and (3) no exceptions to the application of the doctrine exist." *City of Chicago v. Board of Trustees of the University of Illinois*, 293 Ill. App. 3d 897, 900 (1997) (citing *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990)).

In our former decision, we applied this test and concluded that (1) both defendants were clearly arms of the state, (2) the plaintiffs' action was not a present claim with the potential to subject the state to liability, and (3) an exception to the rule of sovereign immunity allowed the plaintiffs to seek relief in the circuit courts. *PHL, Inc. v. Pullman Bank & Trust Co.*, No. 5-97-1064, order at 8 (1998) (unpublished order under Supreme Court Rule 23 (166 Ill. 2d R. 23)). We found that since the plaintiffs did not seek monetary damages, but only injunctive relief, the plaintiffs' case did not amount to a present claim with the potential to subject the state to liability. *PHL, Inc.*, No. 5-97-1064, order at 9.

The defendants argue that even though the plaintiffs' claim concerns the enforcement of a previous agreement, it remains a present claim. A present claim seeks redress for a past harm, a wrong that has already occurred. *Magna Trust Co. v. Department of Transportation, Div'n of Water Resources*, 234 Ill. App. 3d 1068, 1072 (1992). A suit claiming a breach of contract states a present claim that has the potential to subject the State of Illinois to liability and thus must be brought in the court of claims. *Smith v. Jones*, 113 Ill. 2d 126, 133 (1986); *Ellis v. Board of Governors of*

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State Colleges & Universities, 102 Ill. 2d 387, 395 (1984); *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 404 (1982).

In describing the litigation between the parties, the plaintiffs state that although both parties signed the Agreements, the defendants "failed to perform their obligations" under the Agreements. Clearly, the plaintiffs are seeking to enforce their rights under the Agreements. Such an action is a present claim against the State of Illinois, which may not be heard in the circuit court under the doctrine of sovereign immunity.

In our former decision, we relied upon *Vogt v. Bartelsmeyer*, 264 Ill. App. 3d 165 (1994), when we concluded that the plaintiffs' claims did not amount to a present claim with the potential to subject the state to liability. In *Vogt*, this court decided that the circuit court had jurisdiction to enforce a settlement agreement which resolved a "quick take" eminent domain action. *Vogt*, 264 Ill. App. 3d at 171. In *Vogt*, this court found it significant that the state made promises to the plaintiffs but failed to keep those promises over a period of many years. *Vogt*, 264 Ill. App. 3d at 172. The majority relies on *Vogt* now, and I believe this is error. The facts in *Vogt* are distinguishable from the facts in the instant case. Here, the Treasurer and Pullman entered into the Agreements with the plaintiffs, but another party, the Attorney General, is responsible for the impasse. The Attorney General was not a party to the Agreements but issued an opinion that caused the defendants to refrain from finalizing the Agreements. The Treasurer has followed the Attorney General's advice. The *Vogt* case does not provide a basis for finding that the circuit court has jurisdiction of this case.

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Additionally, the order entered by the circuit court clearly may subject the state to liability. Where an action against the state "could operate to control the actions of the State or subject it to liability," that action is barred by the doctrine of sovereign immunity unless brought in the court of claims. *Currie v. Lao*, 148 Ill. 2d 151, 158 (1992). The doctrine of sovereign immunity bars the circuit court from entering a mandatory injunction directing the state to take specific action. *Brando Construction, Inc. v. Department of Transportation*, 139 Ill. App. 3d 798, 805 (1985).

In the case at bar, the circuit court entered a mandatory injunction that directed the state to take specific action, ordering the Treasurer "to perform her duties to effect the transactions described in the [Agreements] and to timely execute and deliver any and all documents required and to otherwise take such action as maybe reasonably required to effect the transaction" According to the plaintiffs, these Agreements were designed to culminate a "variety of complex financial transactions," covering "mortgage loans, additional collateral including letters of credit, and settlement of all litigation concerning the mortgages." The plaintiffs' claims have the potential to subject the state to liability.

I now turn to the question of whether an exception to sovereign immunity applies.

In our former decision, we noted what the issue would be on remand:

> "[T]he trial court must decide the Treasurer's constitutional authority to enter into this buy/sell

> agreement. Sovereign immunity cannot provide a defense where the court must determine if a State agent acted in violation of statutory or constitutional law or in excess of authority. *Hyde Park Medical Laboratory, Inc. v. Court of Claims*, 259 Ill. App. 3d 889, [894] (1994)." *PHL, Inc.*, No. 5-97-1064, order at 10.

On remand, the trial court held that the Treasurer possessed the authority to lawfully enter into the Agreements and that the plaintiffs were ready, willing, and able to consummate those Agreements.

A review of the case law concerning exceptions to sovereign immunity demonstrates that no exception applies in the case at bar. Sovereign immunity will not bar the circuit court from hearing a case against the state where the plaintiff alleges that a state agency or official acted in excess of statutory or constitutional authority or where the plaintiff seeks to enjoin a state agency or official from noncompliance with a statutory or constitutional duty. *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169 (1984) (where the defendant acted in excess of authority by changing procedure without complying with statutory prerequisites, sovereign immunity did not bar a suit in circuit court); *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540 (1977) (where the plaintiffs sought to restrain a state official from acting in excess of authority and where the trial court found that the defendant was acting in excess of statutory authority to suspend the plaintiffs statutory rights, sovereign immunity did not bar a suit in the circuit court); *Busch v. Bates*, 323 Ill. App. 3d 823 (2001) (where the plaintiff claimed damages in tort for

defamation against state officials, claiming that the officials acted in excess of their statutory authority, sovereign immunity did not bar a suit in the circuit court). In the case at bar, the plaintiffs allege only that Pullman and the current Treasurer, who is the successor under the same Agreements considered in *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048 (1994), breached the terms of the Agreements and that she and Pullman should be ordered to perform the terms of the Agreements. These claims do not fall within any recognized exception to sovereign immunity.

The plaintiffs are clearly seeking to enforce their rights under the Agreements. In *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048 (1994), a case related to this one, the court held that the plaintiffs' action did not fall within any recognized exception to sovereign immunity. The following excerpt from that case is instructive herein:

> "The characterization of an action depends upon the factual underpinnings of the case and the law necessary to arrive at a conclusion. In substance, the factual allegations of plaintiffs' complaint are that Treasurer Quinn exceeded his authority by breaching the second restructuring agreement and plaintiffs' action is one seeking to enforce the terms of the contract. *** In light of the facts of this case, were we to accept plaintiffs' argument, then every time a State official signed a contract, any of his acts under the contract with which the other party disagreed would become enforceable

> in the circuit court under the theory that the official exceeded his authority or abused his discretion. [Citation.]
>
> Plaintiffs' claim, therefore, alleges a breach of contract. Such a claim is against the State, barred by the doctrine of sovereign immunity, and must be brought in the Court of Claims. [Citations.]" *President Lincoln Hotel Venture*, 271 Ill. App. 3d at 1057.

Likewise, in the case at bar, the plaintiffs allege only that Pullman and the current Treasurer, who is the successor under the same Agreements considered in *President Lincoln Hotel Venture*, breached the terms of the Agreements and that she and Pullman should be ordered to perform the terms of the Agreements. These claims do not fall within any recognized exception to sovereign immunity. Therefore, the circuit court did not have jurisdiction to consider the plaintiffs' claims.

For all of the reasons stated, we should vacate the trial court's order and, pursuant to Supreme Court Rule 366(a)(5) (155 Ill. 2d R. 366(a)(5)), dismiss the plaintiffs' cause of action.

APPENDIX C — RULE 23 ORDER OF THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT FILED JULY 28, 1998

NO. 5-97-1064
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PHL, INC., an Illinois corporation, and PRESIDENT LINCOLN HOTEL CORPORATION, a Delaware corporation,

Plaintiffs-Appellants,

v.

PULLMAN BANK AND TRUST COMPANY, Trustee under the Illinois Insured Mortgage Pilot Program, dated July 14, 1982, and JUDY BAAR TOPINKA, Treasurer of the State of Illinois,

Defendants-Appellees.

RULE 23 ORDER

Plaintiffs, PHL, Inc. (PHL), and the President Lincoln Hotel Corporation (Hotel Corporation), seek the reversal of the trial court's order denying their request for a preliminary injunction pending the resolution of this case on its merits. The claims in this case revolve around the refusal of defendants, Pullman Bank and Trust Company (Pullman) and Judy Baar Topinka (the Treasurer), to finalize an agreement (the buy/sell agreement) under which plaintiffs were to purchase various mortgages, securities, and letters of credit,

along with hotel property located in Collinsville and Springfield, Illinois. During the course of the case below, plaintiffs requested injunctive relief to prevent defendants from presenting certain letters of credit for payment and to prevent defendants from pursuing court action in Chicago to declare the mortgages covered in the buy/sell agreement to be in default. The trial court initially granted plaintiffs' motion for a temporary restraining order (TRO) but later denied plaintiffs' request for a preliminary injunction and stayed its order pending the outcome of this appeal.

The issues we consider are (1) whether the circuit court lacked jurisdiction over plaintiffs' claims under the doctrine of sovereign immunity and (2) whether the denial of the preliminary injunction was an abuse of the trial court's discretion. For reasons set forth below, we reverse and remand.

I. FACTS

In 1982, the Illinois legislature enacted the Illinois Insured Mortgage Pilot Program (the Program) in order to stimulate the State's economy. Under the Program, a trust was created, into which the Treasurer invests funds and then loans those funds to commercial enterprises. The State of Illinois owns 100% of the trust estate and, through the Treasurer, directs the trust's activities. In 1995, the current Treasurer designated Pullman as the trustee of the Program.

One of the loans made under the Program was to the President Lincoln Hotel Venture, a limited partnership that is connected to the plaintiff Hotel Corporation, although the

exact nature of the business relationship between these two entities is not disclosed in this record. The loan to the President Lincoln Hotel Venture financed the construction of a hotel in Springfield, Illinois, the Springfield Renaissance Hotel (the Springfield hotel). Another loan under the Program went to the Collinsville Hotel Venture, also a limited partnership, which is connected to PHL, although the nature of that connection is also not clear from this record. The loan to the Collinsville Hotel Venture financed a hotel in Collinsville, which is now known as the Collinsville Holiday Inn (the Collinsville hotel). Both hotel ventures are referred to collectively hereinafter as the borrowers. The borrowers are not parties to this lawsuit.

The principal assets of the loans are the hotels, and both are heavily encumbered. By 1995, each loan had been restructured twice, additional terms were added to the original loan agreements, and various lawsuits and appeals were pending concerning the restructured mortgages.

In 1995, plaintiffs offered to buy all of the financial obligations and both of the hotels secured under the loans. PHL offered to buy the loans relating to the Collinsville hotel, and the Hotel Corporation offered to buy the loans relating to the Springfield hotel. On April 19, 1995, plaintiffs entered into the buy/sell agreement with Pullman and the Treasurer, under which the borrowers' then on-going litigation with the State was to be settled and PHL and the Hotel Corporation were to purchase the borrowers' loans for a total sum of $10 million.

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After the buy/sell agreement and its related documents were signed, James Ryan, the Illinois Attorney General, who was not a signatory to the agreements, issued an opinion finding the buy/sell agreement to be invalid and unenforceable. As a result, the terms of the buy/sell agreement were never finalized, and plaintiffs filed this lawsuit in the circuit court of Madison County, seeking mandatory injunctive relief and a writ of *mandamus* to order the sale of the borrowers' loans to plaintiffs for the sum of $10 million.

On October 11, 1996, the trial court entered an order denying defendants' pretrial motions to dismiss. The only ruling that is relevant to this appeal is the court's denial of defendants' motions to dismiss on the ground of sovereign immunity. The trial court decided that the case involved an inseparable combination of contractual and constitutional issues, and as such, the case was not appropriate for the court of claims to decide. The trial court thereby denied defendants' sovereign immunity claims.

Defendants then filed a motion asking the trial court to certify the sovereign immunity issue to this court in a Supreme Court Rule 308 appeal (155 Ill. 2d R. 308). The trial court denied defendants' request, finding, "there is not * * * a question of law as to which there is substantial ground for differences of opinion, and * * * an immediate appeal from this Court's previous order will not materially advance the ultimate termination of this litigation."

On November 4, 1997, plaintiffs filed an emergency motion for a TRO, seeking to enjoin defendants from attempting a "prejudgment attachment of assets." Plaintiffs

alleged that on October 31, 1997, Pullman, at the Treasurer's direction, filed a lawsuit in the circuit court of Cook County to declare the borrowers' loans to be in default. Plaintiffs also alleged that defendants had wrongfully presented for payment certain letters of credit which were part of the original loan agreement with borrowers. On the same day, without notice to defendants, the trial court entered the TRO.

On November 10, 1997, defendants filed a motion to dissolve the TRO, alleging that neither the borrowers nor other defendants in the Cook County action were parties to the Madison County lawsuit and that neither of the plaintiffs in the Madison County lawsuit were parties to the Cook County action.

On November 14, 1997, the trial court took under advisement the issue of dissolving the TRO, but the court extended the TRO for 10 days. The trial court also ordered plaintiffs to replace or extend the letters of credit that were used as collateral for the loans covering the Collinsville hotel, which were to expire on December 15, 1997.

Plaintiffs then filed a response to the motion to dissolve the TRO, arguing that the court had the authority to enjoin non-parties under *Stavros v. Karkomi*, 28 Ill. App. 3d 996 (1975), and under section 11-101 of the Code of Civil Procedure (735 ILCS 5/11-101 (West 1996)). Plaintiffs argued that if defendants were allowed to present the letters of credit for payment, then this "prejudgment attachment of assets" could trigger other contractual provisions among the parties, resulting in irreparable damage to plaintiffs, in that it might destroy plaintiffs' and the borrowers' ability to obtain

credit, which could fatally undermine the buy/sell agreement.' The letters of credit that defendants sought to present for payment totalled over $2.5 million.

On December 9, 1997, the trial court entered an order dissolving the TRO and denying plaintiffs' request for a preliminary injunction on the ground that "plaintiffs * * * failed to establish *irreparable* injury to themselves." (Emphasis in original.) The court further stated:

> "3. Any injuries suffered by the plaintiffs will be monetary in nature[,] and this Court can and will (if justified by the evidence) reimburse the plaintiffs for any losses they incurred from the breach of the agreement with the defendants. The injuries complained of by the plaintiff[s] are injuries of the underlying debtors, but regrettably they are not the parties to this matter. The Court is not happy with the way this matter is being pursued by Pullman Bank and the State of Illinois, but because of the lack of jurisdiction over *all* of the interested parties in this matter, the Court is compelled to dissolve the temporary restraining order and deny the preliminary injunction." (Emphasis in original.)

On December 11, 1997, plaintiffs filed a notice of appeal from the court's December 9, 1997, order.

On December 12, 1997, the trial court granted plaintiffs' motion for a stay pending appeal to prohibit defendants from "collecting on the letters of credit which have been called."

The trial court found that if the stay was not issued, plaintiffs could "lose the fruits of their appeal." The court ordered plaintiffs to post a $200,000 appeal bond, on the condition that if the appeal was dismissed or the December 9, 1997, order was affirmed, "said bond shall be used to secure payment to defendants of any damage they suffer by reason of entry of the stay."

II. ANALYSIS

A. SOVEREIGN IMMUNITY

We first discuss defendants' argument that the doctrine of sovereign immunity bars plaintiffs from proceeding with this matter in the circuit court. Defendants argue that plaintiffs' lawsuit is a contract action against the State of Illinois, which is cognizable only in the court of claims. Defendants claim that the case is against the State of Illinois, that Pullman and the Treasurer are named as defendants only in their capacity as agents of the State, and that the constitutional issue raised by plaintiffs is nothing more than a ruse to prevent this case from being dismissed in the circuit court.

Subject matter jurisdiction is granted to the courts by the constitution or by legislative enactment. *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202 (1985). The question of whether a court has subject matter jurisdiction over a particular controversy is a question of law, which this court reviews *de novo*. *City of Marseilles v. Radke*, 287 Ill. App. 3d 757 (1997). The issue of subject matter jurisdiction can be raised at any time, in any court. *Fredman Brothers*, 109 Ill. 2d at 215.

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Under the State Lawsuit Immunity Act, the State of Illinois cannot be made a party to any lawsuit (745 ILCS 5/1 (West 1996)) except as provided in the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 1996)). The Court of Claims Act provides that the court of claims has exclusive jurisdiction over "all claims against the State founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8(b) (West 1996).

Illinois case law has developed a three-part test to determine whether a defendant is entitled to sovereign immunity and, by extension, whether the case is justiciable only in the court of claims. "Sovereign immunity exists where (1) the defendant is an arm of the state, (2) the plaintiff's action constitutes a 'present claim' with the potential to subject the state to liability, and (3) no exceptions to the application of the doctrine exist." *City of Chicago v. Board of Trustees of University of Illinois*, 293 Ill. App. 3d 897 (1997) (citing *Healy v. Vaupel*, 133 Ill. 2d 295, 308 (1990)).

Applying the test to the instant case, we find that defendants are clearly arms of the State, but we do not find that plaintiffs' action constitutes a present claim with the potential to subject the State to liability. Additionally, we find that an exception applies.

Plaintiffs' complaint alleges that when defendants entered into the buy/sell agreement, "Treasurer Topinka represented to the public and [p]laintiffs that, as State Treasurer, she was authorized to approve the sale of the two loans, just as she is authorized to sell other State investments, including those whose value had been impaired," and that

Pullman "represented to [p]laintiffs that it had the authority to enter into these agreements." Plaintiffs further allege that the Illinois Constitution (Ill. Const. 1970, art. V, §18) gives the Treasurer "unqualified, actual authority to approve the sale" of the borrowers' loans and "to take all action necessary to effectuate the sale of the loans." Plaintiffs' complaint further alleges:

> "51. Having validly bound the State by authorizing the Buy-Sell Agreements * * *, the Treasurer, by adhering to the Attorney General's financial analysis and legal opinion, is acting in derogation of her constitutional duties and in abuse of her discretion and authority by failing to perform the obligations contained in the Buy-Sell Agreements * * *."

In their complaint, plaintiffs ask the trial court to order the Treasurer "to perform her constitutional duties," including the performance of the State's obligation under the buy/sell agreement, to enter a mandatory injunction against Pullman and the Treasurer ordering them to comply with the terms of the buy/sell agreement, and to issue a writ of *mandamus* to compel the Treasurer to perform her constitutional duties under the buy/sell agreement. Because plaintiffs are asking the court to enforce a previous agreement, the case is not a present claim. Because plaintiffs do not seek monetary damages but only injunctive relief to enforce the previous agreement, it does not have the potential to subject the State to liability. See *Vogt v. Bartelsmeyer*, 264 Ill. App. 3d 165, 170-171 (1994).

Additionally, the trial court, in denying defendants' motions to dismiss on the ground of sovereign immunity, found that although the case involves an issue of breach of contract, the "true issue" to be resolved in this case is whether the Treasurer had the authority to enter into the buy/sell agreement with plaintiffs. The trial court reasoned that the court of claims, as a forum of limited jurisdiction, cannot answer the underlying constitutional question at the core of the lawsuit, and therefore, the court rejected defendants' sovereign immunity defense. We agree with the trial court that in order to resolve the merits of this case, the trial court must decide the Treasurer's constitutional authority to enter into this buy/sell agreement. Sovereign immunity cannot provide a defense where the court must determine if a State agent acted in violation of statutory or constitutional law or in excess of authority. *Hyde Park Medical Laboratory, Inc. v. Court of Claims, 259* Ill. App. 3d 889 (1994).

Defendants argue that *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048 (1994), a companion case to this one, resolves the sovereign immunity issue adversely to plaintiffs. We disagree. In *President Lincoln*, the plaintiffs did not allege any constitutional issue, so that no exception to sovereign immunity applied.

B. PRELIMINARY INJUNCTION

We next consider plaintiffs' argument that the trial court erred in denying its request for a preliminary injunction.

> "The purpose of a preliminary injunction is to preserve the status quo pending a decision on the

merits of a cause. [Citation.] It is an extraordinary remedy which is applicable only to situations where an extreme emergency exists and serious harm would result if it is not issued. [Citation.] The four factors which must be established before an injunction will be granted are that: (1) a clearly ascertained right in need of protection exists; (2) irreparable harm will occur without the injunction; (3) there is no adequate remedy at law for the injury; and (4) success on the merits is likely. [Citation.] In ruling on a motion for preliminary injunctive relief, however, controverted facts on the merits of the case are not decided. [Citation.]

When considering the discretion exercised by the trial court in issuing a preliminary injunction, a reviewing court may decide only whether the petitioner has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed; that the circumstances lead to a reasonable belief that they probably will be entitled to the relief sought, if the evidence sustains the allegations of the petition; and that matters should be kept in status quo until the case can be decided on the merits. Thus, the only question before the reviewing court is whether there is a sufficient showing to sustain the order of the trial court." *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 156-57 (1992).

Appendix C

The trial court's order denying plaintiffs' motion for a preliminary injunction lists two bases for the denial: (1) plaintiffs failed to establish any irreparable harm to themselves and (2) any injuries to plaintiffs will be purely monetary and, thus, remunerable without extraordinary injunctive relief. We disagree on both points.

Our review of the record indicates that plaintiffs made a sufficient showing of the four factors to warrant preliminary injunctive relief. As to the first factor, there is no question about plaintiffs' rights. Plaintiffs seek to enforce their rights as listed under the buy/sell agreement. Plaintiffs allege a clearly ascertained right in need of protection.

The second factor requires that irreparable harm will occur without the injunction. The problem that plaintiffs sought to remedy with injunctive relief occurred when defendants filed a lawsuit in Cook County, seeking to find the borrowers in default under their hotel mortgages. Plaintiffs have also alleged that as a part of the Cook County litigation, defendants are seeking to present for payment certain letters of credit that are used as collateral on the Collinsville hotel mortgage. Although the plaintiffs herein are neither the makers nor the beneficiaries of the letters of credit, plaintiffs allege that the total amount of the letters of credit is so large, over $2.5 million, that if defendants are allowed to cash in the letters of credit, the borrowers' ability to obtain credit will be severely undermined and, as a result, the entire loan structure contemplated under the buy/sell agreement may fall like a house of cards. As a court of review, we are not to decide if plaintiffs have proved these allegations but should consider only if plaintiffs made a sufficient

showing to warrant the equitable relief requested. *Hartlein*, 151 Ill. 2d at 157. We find that plaintiffs made a sufficient showing of irreparable harm to themselves by alleging the manner in which the Cook County litigation could undermine the buy/sell agreement at the heart of this litigation.

We additionally find no impediment to injunctive relief because the requested injunction involves nonparties to the instant litigation. The following principle is well established: "[O]ne may be bound by an injunctional order, although he is not formally named as a party to the lawsuit. All that need be established is the requisite involvement and that actual notice was received." *Stavros*, 28 Ill. App. 3d at 1003.

In the case at bar, plaintiffs seek to enjoin defendants, who are certainly parties to this lawsuit, from cashing in certain, specified letters of credit. That the letters of credit were issued to the borrowers, who are not parties to this lawsuit, in no way deprives the trial court of jurisdiction to control the actions of the defendants to this lawsuit. Additionally, to the extent that the nonparties to this lawsuit have their actions curtailed via the preliminary injunction, such is allowed under the circumstances presented herein. "Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, employees, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." 735 ILCS 5/11-101 (West 1996).

The third factor concerns whether there exists an adequate remedy at law. By entering the TRO, the trial court

found that no adequate remedy existed to compensate plaintiffs if defendants were allowed to cash in the letters of credit and thereby fatally undermine the buy/sell agreement. Although no facts changed between the issuance of the TRO and the denial of the preliminary injunction, the trial court decided, in denying the preliminary injunction, that "[a]ny injuries suffered by the plaintiffs will be monetary in nature and this Court can and will (if justified by the evidence) reimburse the plaintiffs for any losses they incurred from the breach of the agreement with the defendants." We disagree that any injuries plaintiffs may suffer will be purely monetary in nature. The record is clear that the buy/sell agreement is an entirely unique and highly complicated financial undertaking, the loss of which will entail much more complicated damages than purely monetary damages reimbursable by the trial court.

Additionally, by granting the preliminary injunction, the trial court will be maintaining the status quo for what appears to be a short period of time. Both parties agreed in oral argument before this court that the trial court already ruled that the Attorney General did not have the right to control the parties' actions under the buy/sell agreement. According to the parties at oral argument, only one issue remained for the trial court's ruling, whether plaintiffs are ready, willing, and able to comply with their obligations under the buy/sell agreement. The parties anticipated that the trial court would rule on that issue without delay. Therefore, if a preliminary injunction is entered to preserve the status quo, defendants will not be unduly prejudiced pending the resolution of the remaining issue before the trial court.

Appendix C

Finally, we consider whether plaintiffs have made a sufficient showing of likely success on the merits. When deciding how to rule upon this factor, the court is not to decide controverted issues of fact but is only to decide whether "the circumstances lead to a reasonable belief that [plaintiffs] probably will be entitled to the relief sought, if the evidence sustains the allegations of the petition" or complaint. *Dixon Association for* Retarded *Citizens v. Thompson*, 91 Ill. 2d 518, 524-25 (1982) . In the case at bar, there is sufficient evidence that plaintiffs entered into the buy/sell agreement and that if defendants were authorized by law to do so, they also bound themselves under the terms of the buy/sell agreement. Thus, without deciding the merits of plaintiffs' complaint, it is clear that they are entitled to the relief they seek if the facts are as alleged in their complaint.

III. CONCLUSION

For all of these reasons, we find that the trial court abused its discretion when it denied plaintiffs' motion for a preliminary injunction. Accordingly, we reverse the court's December 9, 1997, order dissolving the TRO and denying the motion for a preliminary injunction, and we remand this case back to the trial court for further proceedings consistent with this order. Also, we deny defendants' motion to vacate stay.

Motion to vacate stay denied; judgment reversed; cause remanded.

HOPKINS, J., with MAAG, J., concurring.

Appendix C

KUEHN, J., specially concurring:

I concur with my colleagues' decision on the question properly before this court, the denial of a preliminary injunction pending the resolution of this case on its merits. I refrain, however, from concurring in any part of the decision that discusses sovereign immunity.

This is an interlocutory appeal under Supreme Court Rule 307 (166 Ill. 2d R. 307). That rule opens our doors for review of the trial court's denial of a preliminary injunction. Whether the trial court properly denied the State's motion to dismiss under the doctrine of sovereign immunity is a question we should consider at such time that it is properly raised for review. Since the State failed to seek certification of the question of sovereign immunity at the time it received the trial judge's ruling on it, appellate review of that issue should await a final judgment.

APPENDIX D — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR REHEARING DATED SEPTEMBER 26, 2005

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
SPRINGFIELD 62701

September 26, 2005

Mr. William J. Harte
William J. Harte, Ltd.
111 W. Washington St., S#1100
Chicago, IL 60602

No. 96250 - 96294 Cons. PHL, Inc., et al., appellees, v. Pullman Bank and Trust Company, etc., et al., appellants. Appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 6, 2005.

Garman and Karmeier, JJ., took no part